HANDBOOK

ON

ELECTION LAWS

BY

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SPECIAL PREFATORY INTRODUCTION.

By general consent, in this country elections have been regarded as the incidental engagement of mankind. The general mankind engaged in various occupations of commerce have either ignored elections or regarded them as objects which intruded upon the time or financial opportunity of the citizen. This particular citizen would have curtailed the elections to as few as possible, while others would have avoided elections by making all offices appointive, and of this latter individual we will not fail to observe the utter absence on his part of any reflection or conclusion as to how that particular citizen was to be named who was to make these appointments. It is interesting to note that those who have engaged in elections are those who have had the least to gain from them and who in the end suffered the most as a result of them. We mean the individual engaged in humble occupation. He was active in elections; he seldom knew anything about the principles of

government; he only knew some immediate wrong which was around him and which he felt touched him; or he knew some immediate right which had been denied him to which he was entitled, as had been taught him by the press or the public orators, or by the comments and protests of his neighbors. When the election was on, this active individual voted for something which benefited everyone else but himself. Or, in the heat of campaign, or induced by others who were not interested in his welfare, he voted something out, of which he was really the beneficiary, and did not know it until it was lost.

Through all of this the method of elections was lost sight of. If ever there was a system in free government that personified in its practice the meaning of the old adage of the "end justifying the means" it is elections. Those who won were content to rest there;—they drew their consolations from the philosophy that the result obtained justified every measure adopted in the process. Those who were defeated reversed the theory, their doctrine being that the very end obtained showed the means resorted to were unnecessary, unlawful or unwise. The intelligence of the community, except upon election day, seldom directs itself to elections at all. Then

it directs itself to the mere manner in which it casts its vote of assertion or vote of protest. The method of securing the proper voter, or of assuring that the voter who did vote was a proper person within the meaning of the law, was always overlooked; indeed seldom thought about. The method of having the vote counted when properly cast was an action reflected upon, but that merely from a degree of personal pride or personal vindication of each particular voter to vanquish his opponent and his desire to have his vote registered to accomplish that end. The great fundamental questions of liberty, the orderly procedure of government, the security of citizenship, all involving a proper procedure of elections and one which engaged the attention and held the confidence of the citizen, were as unknown as they were unthought of by the ordinary voter.

Let it be frankly admitted, the judges of the courts have known little of the election laws, and only when a question was brought before them was investigation made or information obtained. Then the field would be new and the judge would be as an experimenter. While he would have resented the intimation that he did not know the fundamental constitution, the decisions construing

the law as based upon it, and the decisions demonstrating their meaning,—he would have been perfectly willing to admit that the exception to this general information related to the very organization which was necessary as a thing of life before any of the others of which he did know could exist in security or in respect. The ordinary lawyer knew little of election laws unless he had been participating in politics. And the general citizen who fancied he knew his rights as a man, not only did not know his rights as a political citizen and officer of government and as an apostle of liberty, but he made no effort to obtain the knowledge and in the nine out of ten times was either juggled from these rights by the instrumentalities or agencies which would profit by such procedure, or when not juggled, had his rights taken from him by the indirect method of ignorance or indifference.

In States such as Illinois, where the Australian system of elections, with appropriate modifications, had been adopted and are now in vogue, conjoined to a primary system, it was thought wise by the authors of this work to present in a concise form the general law of elections, and present such in a manner as would be agreeable to the student of gov-

ernment, acceptable to the advocate of the Bar, advisory to the judge on the bench, and informing to the citizen at large. Late events occurring in the State of Illinois, and in our neighboring States, indeed, have clearly demonstrated that the absence of such a book, of such a source of information, can be charged as the responsibility for ignorance inexcusable, conduct unpardonable and offenses unjustified, which have all transpired and been committed at every election within the last ten years and in the memory of the present citizen who is living through that decade. Few books have been written upon elections, as writers of law books were more given to write upon subjects which were in general demand.

We have referred to the limited sphere in which elections were considered at all as governmental agencies. This limited sphere no doubt restrained the inclination of writers upon the subject of elections. It may be that the fact of elections under the guidance of the law having of late received sanction as a sovereign thing has, because of the slow progress, retarded the stimulus which otherwise would have attracted the subjects of government to the student.

This book is now tendered to those who

may be interested in the subjects, particularly to the profession of the law, with no pretense that it offers any philosophy, that it tenders anything novel, or that it inducts any doctrine of government. It is offered as something of a guide,—perhaps as an index—to the general rules applicable to the conduct of elections, that the same may serve as some direction and some aid to those who may have occasion to look to the law of elections for information, or the method of prescribed procedure as guidance. It is to be earnestly hoped that, as the law of elections may widen and develop, our citizenship may take more heed and more interest in their growth and in their meaning. At present this book is tendered with the trust that it may contribute in some small part to what in future will be a larger field and one of greater philosophy and learning than this little effort is intended to suggest.

If it shall lighten the labor of the Bar, be of some information to the courts and any source of instruction to the citizen, the writers will have been compensated.

Jas. Hamilton Lewis.

Chicago, July, 1912.

HISTORICAL INTRODUCTION

The history of election laws constitutes one of the most interesting chapters in legal history. The origin and evolution of elections is throughout closely connected with the creation and development of free political institutions. The existence or non-existence of elections, together with the character of the elections if they do exist, furnish a clue to the general character of the laws of any country or period.

In the earliest age in the history of nearly every race the existence of rude elections in the popular assemblies, is to be seen. The greatest development in this field in ancient times was reached in some of the city republics of Greece, and more especially in the Roman Republic. The establishment of the Roman Empire, and later of the Feudal System, almost eradicated popular elections as an element in national government.

"Elections seem to have originated in the general assemblies of citizens (or perhaps in the old labor-gilds), as in the Roman concilia, the Athenian ecclesia or the Teutonic

assemblages of freemen. When they passed away, first in fact and then in form, in the growth of despotism and autocracy, the custom of election was preserved in the monastic fraternities, ecclesiastical conventions, free cities, and trade-gilds. Favored electors, as in Germany, often elected emperors or even kings." (The Encyclopedia of Social Reform, page 438.)

The re-establishment of popular elections as the controlling power in government was the work of the Anglo-Saxon race. Popular elections seem to have been well known to the Anglo-Saxons, even in their continental homes, and were not forgotten by them after their invasion and conquest of Britain. The old Dux was an elective office. The later developed Kingship was theoretically, and to a certain extent also actually, elective. The higher ecclesiastical officials, the bishops and the abbots, were elected by the clergy. The principle of representation was to be found in the reeve and four men from each township who attended the county and hundred courts, as the representatives of such township. The development of the system of representative government, therefore, in England during the thirteenth and fourteenth centuries was no radical departure, but merely a new ap-

plication of principles with which the Englishmen of that period were already familiar.

Neither the elective nor the representative principle, however, had had any place in the legislative branch of the English Government during the early Norman period. The Curia Regis of the Norman English Kings, the nearest approach to a legislative body in England for the period after Senlac, was a court of the King's feudal vassals, a body whose powers and duties were of a mixed legislative, executive and judicial nature. In theory, at least, every tenant-in-chief of the King by military service, had a personal right to be summoned to this council; certainly when the King was to impose any extraordinary aid, and probably also on other occasions.

The first national council or parliament which was in any sense a representative body was that held at St. Albans on August 4th, 1213, where the royal demesnes were each represented by the reeve and four men. The lesser barons, i. e., lesser tenants-in-chief, about this time began to lose their theoretical right to attend the National Council; at the same time they, in common with the other freeholders, began to acquire the right to elect representatives to the National Council,

Four Knights of the Shire were summoned by King John to the National Council in 1215. Two Knights from each shire attended the National Council in 1254; these were chosen by the freeholders of the Shire in their county court, the semi-popular, semi-representative assembly of the county.

A rapid development of representative government took place during the Barons' war. In 1261 there were two rival summons to a National Council; the one by the Barons summoning three Knights from each county to meet at St. Albans, and the other by the King for a similar representation in his Council to be held at Windsor. In Simon de Montfort's Parliament the counties were represented by four Knights each. The final step was taken by Simon de Montfort in the year 1265 when, in addition to the Knights of the Shires, he summoned to the Parliament two citizens from each city or borough. This was the first Parliament in which all classes of the people were represented; the first truly national representative assembly in the history of the world. The overthrow of Simon de Montfort a few weeks later put a check to this work. The representation of the cities and even of the Knights of the Shire during the next thirty years was irregular and uncertain, and

it is only from the latter year that we can date the regular and complete establishment of a perfect representation of the three estates in Parliament. From 1295, however, all the constitutent elements of Parliament became established. With the exception that the representations of the lesser clergy drop out in the fourteenth century and the abbots in the sixteenth there was little change in the constitution of Parliament from the Parliament held by Edward I, in 1295, to the one which passed the great reform bill in 1832.

The Anglo-Saxons' greatest contribution to the world's political progress consists in this invention and development of representative legislative assemblies. The lack of such institutions in earlier times rendered free government impractical, except in mere city states. It was largely this defect which caused the fall of the Roman Republic. The Roman legislative assemblies, the comita curiata, the comita centuriata, the comita tributa, were all primary assemblies. All Roman citizens voted in such assemblies. Such a system, which could succeed when Rome was a city republic on the Tiber, became inadequate with the extended area of her later days. Legislation by primary popular assemblies was no longer possible, and repre-

sentative legislative assemblies had not yet appeared. There remained nothing but the Empire.

Government by the people now having been rendered practical, the question of the manner in which elections should be conducted became of the greatest importance. The pioneer work in this legal field was also to be performed by members of the same Anglo-Saxon race, but the honors were destined to be won neither by England herself nor by our own country, but by England's great colony of the southern hemisphere. It was, in fact, several centuries after the establishment of representative legislative assemblies before any real progress was made in the method of conducting elections.

For a long period in England, members of Parliament were elected by a show of hands. There is no record of any poll ever being taken until after the passage of the statute of 8 Henry VI (1429) and even as late as the sixteenth century a show of hands was considered as a legal method of determining an election. The right to demand a poll was only fully established by statute of 7 and 8 William III (1696). After the polling of voters had been finally adopted, the method of taking the votes remained crude and ob-

jectionable for a long period. The voter was compelled to orally state for whom he wished to vote. The polls were often kept open for several days; in one election in Mayo County it is recorded that the polls were open for fifty-seven days.

The next step in advance consisted in the introduction of the ballot. To the Anglo-Saxon belongs the honor, not of first introducing the ballot, but of first making it of practical value. Ballots are found in use even in the republics existing before Christ, and the Gabinian law of 139 B. C. contains very elaborate provisions for the use of ballots in elections. All early methods of voting by ballot lacked those modern features from which the superiority of this form of voting is mainly derived.

America was greatly ahead of England in the adoption of the use of ballots. In many portions of the country ballots were used even in colonial times, and most of the States uniformly used this system after the Declaration of Independence. The viva voce system of voting continued the longest in some of the Southern States, especially in Kentucky.

"In Great Britain it (i. e. the use of the ballot) was not only fought by the privileged

classes as overthrowing their leadership of the tenants and artisans, but by a large part even of the Liberals as undermining the manliness of the English character. The vanguard of the movement were the Benthamites and it stood foremost in the programme of reform put forward by the more radical Whigs early in the nineteenth century. It was in the first draft of the Reform Bill of 1832; in 1833 Grote the historian introduced it, and repeated the attempt every year till 1839 with a fresh speech of immense force and learning. It was supported by Macaulay with his usual effectiveness, but was sneered at by so good a Liberal as Sydney Smith, and heartily supported by none but the Chartists whose support alone would have killed it. They made it one of their 'six points' of their 'People's Charter.' In 1851 it was carried in the Commons by 51 majority against Lord John Russell and his Liberal government, but went no further. In 1869 it was tried at Manchester as a test, and worked well; was adopted at school-board elections in 1870; and the same year a select committee of the House, headed by Lord Hartington, reported in its favor as a means of lessening corruption, 'treating' and intimidation. In 1872 Mr. W. E. Forster's ballot act made printed ballots com-

pulsory at all national and municipal elections except those of university candidates for Parliament. This put an end to the drunken riots attending the previous public nominations at the hustings, so keenly satirized by Dickens and others." (Americana Vol. II.)

The mere use of a printed ballot did very little by itself to eliminate the existing election evils. Where the different political parties printed their own ballots, there was little, or no, greater secrecy in voting than under the viva voce system, and the same opportunities for the intimidation of voters still existed. In addition the use of ballots introduced new methods of fraud, impossible under the viva voce voting, such as "stuffing" the ballot box and repeating.

The great advance towards fair elections was that made by the introduction of the Australian ballot system, the history and purposes of which are discussed in the body of this book. A still more recently developed method of voting is that by voting machines, which is still in an embryonic stage.

The great innovation which this country has produced in the field of political methods has been the party nominating convention. This institution, so long the central feature

in American politics, is now being rapidly relegated to the past by the new system of primary nominations.

The introduction of the Australian ballot, of primary nominations and of the initiative and referendum, has so entirely revolutionized American political conditions during the past quarter of a century, that the American elections and election laws with which the last generation was familiar bear almost no resemblance to those of today. It seems probable that the most enduring work which the present generation will accomplish in the field of jurisprudence is the reform of the election laws.

CHAPTER I

THE RIGHT TO VOTE

Section 1. Not a Universal Right

The right to vote is not one of those rights known as "natural rights."[1] The right to vote, and voting itself, can only begin to exist after men have organized themselves into society, and created government, and the right to vote must be determined by the rules of the government thus created. The qualified voters of a State, at any time, have the right to decide what shall constitute any inhabitant of the State a qualified voter, and may grant, or withhold, the right of suffrage at pleasure.[2]

The extent and the character of the restrictions placed upon the right to exercise the elective franchise have varied greatly in different localities and at different times; the modern tendency being towards greater and greater liberality in this respect. It has never been proposed, however, nor could it ever be practical, to give the ballot to every member of a country or community. Certain classes

in the community, at the very least, insane persons and children, must be excluded from this privilege, for the protection of all classes in the community, including themselves.

The right to vote is not a vested right. A law, properly passed, taking away this right from persons who had previously possessed it would be valid.

Certain classes in a State may be given a partial right of suffrage. At an early period in this country it was customary to have a graduated system of qualifications for electors for different officials. This condition caused the peculiar wording of that clause in the Federal Constitution which provides that: "The House of Representatives shall be composed of members chosen every second year by the people of the several States, and the electors in each State shall have *the qualifications requisite for electors of the most numerous branch of the State Legislature.*"[3]

Illustrations of the limited suffrage of this character are to be found at the present time in the laws of a number of the States permitting women to vote in school elections only, or in municipal elections only.

Notes

1. Spencer vs. Board of Registration, 1

MacArthur 169, 29 Am. Rep. 582; Anderson vs. Baker, 23 Md. 531.

2. Blair vs. Ridgely, 41 Mo. 63, 97 Am. Dec. 248.

3. United States Constitution, Article I, Section 2, Clause 1.

Section 2. Determination of the Right to Vote in the United States

The right to determine as to the qualifications for voting, both as to National, State and local elections, belongs to the Legislatures of the several States.

The only two classes of Federal officials who are (or may be) elected by popular vote are Presidential Electors and Representatives in Congress.

The Constitution of the United States provides that each State shall elect as many Presidential Electors as it has Senators and Representatives in Congress, and that such electors shall be appointed in each State in such manner as the Legislature of the State shall determine.[1]

In the early years of the Republic these electors were chosen in the different States in three different ways: (1) directly by the State Legislature; (2) by popular vote, the voters voting by districts; (3) by popular

vote, the voters throughout the State voting on a general ballot for the full number of electors to which the State was entitled. Since 1832 all the States at every election have chosen their electors by the third method, with the exceptions of South Carolina, where the Presidential Electors were chosen directly by the State Legislature until after the close of the Civil War, and Michigan, where the electors were chosen by districts in the single election of 1892. The constitutionality of the law of Michigan providing for this method of choosing electors was upheld by the Supreme Court of the United States.[2] Any State Legislature has the undoubted power, at any presidential election, to choose the Presidential Electors, and entirely abolish any popular vote on this point.

The Federal Constitution originally gave to the States an unlimited discretionary power over the qualifications of voters for members of the National House of Representatives.[3] Limitations upon this power were imposed for the first time by the Fifteenth Amendment to the Constitution, which provides that: "The right of citizens of the United States to vote shall not be denied or abridged by the United States, or by any State, on account of race, color or previous

condition of servitude." Any other condition may be imposed by any State Legislature upon voting either for members of Congress or for State officials, with the possible exception that a State statute, too greatly restricting the right of suffrage, might be held to be in violation of the clause in the Federal Constitution which provides that: "The United States shall guarantee to every State in this Union a republican form of government."[4] Particular qualifications for voting are discussed in Chapter II.

The legislative assemblies of the Territories have had, in the past, the authority to regulate the right of voting, subject to the restrictions and limitations imposed by the Federal Constitution and the Acts of Congress.[5] This power belongs primarily to Congress, and has only been delegated by them to the Territorial Legislatures. The right to vote in the colonies of the United States is mainly regulated directly by Congressional legislation.[6]

Notes

1. United States Constitution, Article II, Section 1, Clause 2.

3. United States Constitution, Article I, Section 2, Clause 1. Also see Section 1 of this book.

4. United States Constitution, Article IV, Section 4.

5. Innis vs. Bolton, 2 Idaho 407, 17 Pac. 264.

6. E. g. Act of Congress of July 1, 1902, establishing government in the Philippine Islands.

Section 3. Remedies in Cases of the Deprivation of the Right to Vote

Although the right to vote is neither a property right, nor a right of person, but only a mere political privilege, nevertheless it was early settled in the famous English case of Ashby vs. White,[1] that, under the Common Law, a man entitled to vote for members of Parliament had a right of action, in trespass on the case, for damages against the election officers who refused to receive his vote. This rule was very soon modified so as to limit recovery to cases where the vote was rejected through malice.[2]

In this country an action for damages will lie against election officers who wilfully and maliciously refuse to accept the vote of a duly qualified voter.[3]

In an Illinois case it was decided that the election officials were liable when the sole ground for their refusal to permit the plain-

tiff to vote was the fact that he was of the negro race.[4]

The Massachusetts rule on this question differs from the prevailing rule in this country, and holds that damages may be recovered for the wrongful deprivation of the right to vote, without proof of malice.[5] This rule has been followed by Maine,[6] Ohio,[7] and Wisconsin.[8]

In a Connecticut case,[9] it was held, that regardless of the question of malice or good faith, the election officers were liable to a registered voter, to whom they denied the right to vote, the registry list, under the laws of the State, being conclusive upon the election officials.

In cases where malice on the part of the election officials is an element of the action, the courts have taken an extremely eral position as to the evidence which is admissible on this point. Evidence, on behalf of one side or the other has been admitted to prove that the election official knew that the voter belonged to the opposite political party from himself;[10] to prove that the election officer had acted under the advice of a lawyer;[11] and to show discrimination on the part of the defendants in the cases of different voters, similarly circumstanced.[12]

In an action of this character, the plaintiff

must affirmatively show his right to vote,[13] and the denial of such right.[14] It is not necessary for the plaintiff to prove that the election was a valid one; the mere fact that it was held is sufficient.[15]

In the case of a refusal to permit a qualified voter to vote for members of Congress, the action against the election officials may be brought in a State court, or (if the amount of the damages alleged is sufficient) in a Federal court.

When registration is a necessary requisite for voting, the registration officials who maliciously refuse to permit a qualified person to register, in spite of a proper showing on his part, are liable for damages.[17] Election officials are also liable who improperly and maliciously strike a voter's name from the list of voters. In a similar manner assessors who prevent a properly qualified person from voting, by maliciously failing to assess him (where assessment is a prerequisite to voting) are liable.[18]

When a vote is rejected because the voter's name has been improperly erased from the list, the action is for the wrongful erasure of the name, and not for the refusal to receive the vote.[19]

No action will lie against a carrier of pas-

sengers, on the ground that because of the negligence of such carrier the plaintiff did not arrive at his destination in time to vote at an election.[20]

Where malice is proved on the part of the officials rejecting the ballot, punitive damages may be recovered.[21]

Notes

1. 1 Bro. P. C. 45, 2 Ld. Paym, 936 (decided in 1703).
2. Drewe vs. Coulton, 1 East 563; Cullen vs. Morris, 2 Stark 577.
3. Swafford vs. Templeton, 186 U. S. 487; Byler vs. Asher, 47 Ill. 2; Friend vs. Hamill, 34 Md. 298.
4. Bernier vs. Russell, 89 Ill. 60.
5. Lincoln vs. Hapgood, 11 Mass. 354.
6. Osgood vs. Bradley, 7 Maine 411.
7. Jeffries vs. Ankeny, 11 Ohio 372.
8. Gillespie vs. Palmer, 20 Wis. 544.
9. Hyde vs. Brush, 34 Conn. 454.
10. Elbin vs. Wilson, 33 Md. 135.
11. Miller vs. Rucker, 1 Bush (Ky.) 135.
12. Cullen vs. Morris, 2 Stark 577.
13. Mills vs. McCabe, 44 Ill. 194; Griffin vs. Rising, 11 Metcalf (Mass.) 339.
14. Gates vs. Neal, 23 Peck (Mass.) 308.
15. Bernier vs. Russell, 89 Ill. 60.
16. Wiley vs. Sinkler, 179 U. S. 58.

17. Perry vs. Reynolds, 53 Conn. 527.

18. Griffin vs. Rising, 11 Metcalf (Mass.) 339.

19. Harris vs. Whitcomb, 4 Gray 333.

20. Morris vs. Colorado Midland Railway Company, 48 Colo. 147; 109 Pac. 430; 20 Amer. & Eng. Am. Cases 1006.

21. Wiley vs. Sinkler, 179 U. S. 58.

CHAPTER II

QUALIFICATIONS OF VOTERS

Section 4. Limitations on the Power of a State Legislature to Impose Restrictions Upon the Right of Suffrage

The principal limitations upon the power of a State legislature to impose restrictions upon the right of suffrage are found in the provisions of the Fifteenth Amendment to the United States Constitution, and in the fact that laws imposing such restrictions must be uniform in their application. Uniformity of application, however, is not destroyed by the fact that of two citizens qualified to vote so far as one particular restriction is concerned, one only may be permitted to vote, the other being disqualified by some other restriction.

The Fifteenth Amendment to the Federal Constitution prohibits any discrimination (as to voting) on account of race, color, or previous condition of servitude.[1] This amendment does not confer on members of the negro race the right to vote,[2] but it does

prevent the right being denied to them for this reason.[3]

Any State statute which denies or abridges the right of voting to any person on account of race or color is in violation of the United States Constitution, whether the attempt is made to deprive a person of his rights in this respect directly or indirectly. The adoption of the Fifteenth Amendment rendered invalid a provision in any State Constitution limiting the right of suffrage to members of the white race.[4]

Notes

1. See Section 2.
2. United States vs. Reese, 92 U. S. 214.
3. Id.
4. Neal vs. Delaware, 103 U. S. 370.

Section 5. Age Qualifications

A State has full discretion as to the age qualification to be placed upon voting. At the present time a practical unanimity has been reached in this respect; twenty-one years being adopted as the minimum voting age.

A person may vote on an election which falls on the day immediately preceding his twenty-first birthday anniversary.[1]

Notes

1. In re Griffiths, 1 Kulp (Pa.) 157.

Section 6. Educational Qualifications

Educational qualifications for voting are found in the laws of a few States and are valid.

In a recent case, the Massachusetts statutes providing that certain persons, before registering, must read a selection from the Constitution and write their name, was held not to violate the Fourteenth Amendment to the United States Constitution.[1]

The educational qualifications now in force in the different States of this country have been thus summarized by a recent writer:

"Maine, Massachusetts, Connecticut, Delaware, California, Wyoming and the States mentioned below demand an ability to read, Mississippi allows men to vote who can understand the Constitution when read to them. North Carolina has an educational test, but does not apply it to those who voted or whose ancestors voted before 1867. South Carolina does not deprive those intellectually unfit if they own property assessed at $300. In Alabama, voters must be able to read or must own property worth $300, unless they have

seen military service. Virginia requires ability to read or understand the Constitution, or the payment of a State tax not less than one dollar per year, unless the individual has seen military service or is the son of an American soldier. In Louisiana those may vote who can read or write, or who own property assessed at $300, or whose ancestors voted before 1867. Georgia permits veterans and their descendants to vote, limiting the suffrage for others to those who can read or understand the Constitution or own taxable property worth $500. The clauses in five of these Constitutions that really exempt whites from the disabilities which are supposed to be the same for all, are called 'grandfather clauses.' The United States courts have refused to consider cases which might force them to declare whether these provisions are contrary to the Fifteenth Amendment."[2]

Notes

1. Stone vs. Smith, 159 Mass. 413; 34 N. E. 521.

2. Ashley's American Government, Sec. 30.

Section 7. Religious Qualifications

There is nothing in the Constitution of the United States to prevent a State from im-

posing religious qualifications upon voting. The right to vote might even be limited to members of a single denomination.

The Constitution of each of the States, however, contains provisions against such a procedure; and there are now no religious restrictions placed upon voting, in this country, except that a few Western States have provisions in their laws directed against the Mormons. Such statutes are in the main directed against the practice of polygamy, rather than against the mere mental belief in the tenets of the Mormon religion.

A statute of Nevada which prohibited Mormons from voting at elections, and which required those applying to register as voters to take oath that they were not members of the Mormon church, was held to be unconstitutional under the Nevada State Constitution.[1]

Notes

1. State vs. Findlay, 20 Nev. 198, 19 Pac. 241.

Section 8. Property Qualifications

The ownership of property,[1] or the payment of taxes;[2] may be fixed as one of the qualifications of a voter. Such restrictions are not in conflict with the Fifteenth Amend-

ment to the Federal Constitution.[3] However, if the provisions of the Fourteenth Amendment were enforced, such restrictions would constitute a sufficient ground for the reduction of the State's representation in the House of Representatives.

Where property qualifications for voting exist, a person to whom land is deeded, merely for the purpose of permitting him to vote, without any intention of changing the real ownership of the property is not entitled to vote.[4]

Notes

1. Inhabitants of Windham vs. Inhabitants of Portland, 4 Mass. 384; In re Horgan 16 R. I. 542, 18 Atl. 279.
2. Frieszleber vs. Shallcross, 9 Houst. 1, 19 Atl. 576.
3. United States vs. Reese, 92 U. S. 214.
4. Murdock vs. Weiner, 55 Ill. App. 527.

Section 9. Sex Qualifications

The question of extending the elective franchise to women, or of restricting it to the male sex, is one entirely within the discretion of each State. The denial, to women, of the right to vote does not conflict, in any way with either the Fourteenth or the Fifteenth

Amendment to the United States Constitution. On the other hand there is nothing in the Federal Constitution which prevents a State from giving full suffrage to women, as has been done by Wyoming, Utah, Colorado, Idaho, Washington and California.

Partial suffrage, i. e. the right to vote for certain officials only, may be granted to women.[1] Suffrage in a more or less limited form is now possessed by women in Arizona, Delaware, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Massachusetts, Michigan, Minnesota, Montana, Nebraska, Nevada, New Hampshire, New Jersey, North Dakota, Oklahoma, Oregon, South Dakota, Texas, Vermont, and Wisconsin.

In States where both men and women have the general right of suffrage, no qualification for voting can be imposed upon the members of one sex, and not upon those of the other. Thus a statute of Utah, requiring all male voters to be taxpayers, without imposing the same condition upon female voters, was held to be unconstitutional and void.[2]

Notes

1. Plummer vs. Yost, 144 I. 61, 33 N. E. 191.
2. Lyman vs. Martin, 2 Utah 136.

Section 10. Citizenship Qualifications

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."[1]

No State can in any way limit the right of citizenship. A person born in this country is a citizen, even although his parents belong to a race, members of which cannot become naturalized in this country. (e. g. Chinese)

There is no direct connection between citizenship and the right to vote. A citizen may be disqualified from voting by the application of age, education, sex, property, or other qualifications for voters. On the other hand, citizenship is not a necessary qualification of a voter.[2] Aliens who have declared the intention to become citizens, may vote under certain restrictions in Alabama, Arkansas, Colorado, Indiana, Michigan, Missouri, North Dakota, Oregon, South Dakota, Texas, and Wisconsin.

In a great majority of the States only citizens are permitted to vote, but in a few States the right of suffrage is extended to those who have declared their intention to become citizens, or who have been honorably discharged from the army or navy of the United States.[3]

Notes

1. Fourteenth Amendment to United States Constitution, Sec. 1.
2. Spragins vs. Houghton, 2 Scam. (Ill.) 377.
3. See statutes of the particular states.

Section 11. Residence Qualifications

Residence qualifications for voters are to be found in the statutes of all of the States. In some States only a certain period of residence in the States and in the county are specified, in other States a period of residence in town or precinct, or both is also added.

The periods to previous residence required, in the different States, to qualify a person to vote are as follows:

In Alabama, two years in the State, one year in the county, three months in the town, three months in precinct.

In Arkansas, one year in the State, six months in county, thirty days in the town, and thirty days in the precinct.

In California, one year in the State, ninety days in the county, and thirty days in the precinct.

In Colorado, one year in the State, ninety days in the county, thirty days in the town, and ten days in the precinct.

In Connecticut, one year in the State and six months in the town.

In Delaware, one year in the State, three months in the county and thirty days in the precinct.

In Florida, one year in the State, six months in the county, and thirty days in the precinct.

In Georgia, one year in the State, and six months in the county.

In Idaho, six months in the State, thirty days in the county, three months in the town, and ten days in the precinct.

In Illinois, one year in the State, ninety days in the county, and thirty days in the precinct.

In Indiana, six months in the State, sixty days in the county, sixty days in the town, and thirty days in the precinct.

In Iowa, six months in the State, sixty days in the county, ten days in the town, and ten days in the precinct.

In Kansas, six months in the State, thirty days in the county, thirty days in the town, and ten days in the precinct.

In Kentucky, one year in State, six months in the county, sixty days in the town and sixty days in the precinct.

In Louisiana, two years in the State, one

year in the county, and six months in the precinct.

In Maine, three months in the State, three months in the county, three months in the town, and three months in the precinct.

In Maryland, one year in the State, six months in the county, six months in the town and one day in the precinct.

In Massachusetts, one year in the State, six months in the county, six months in the town, and six months in the precinct.

In Michigan, six months in the State, twenty days in the county, twenty days in the town, and twenty days in the precinct.

In Minnesota, six months in the State, thirty days in the county, thirty days in the town, and thirty days in the precinct.

In Missouri, one year in the State, sixty days in the county, sixty days in the town, and sixty days in the precinct.

In Montana, one year in the State, thirty days in the county, thirty days in the town and thirty days in the precinct.

In Nebraska, six months in the State, forty days in the county, ten days in the town, and ten days in the precinct.

In Nevada, six months in the State, thirty days in the county, thirty days in the town, and thirty days in the precinct.

In New Hampshire, six months in the State, six months in the county, six months in the town, and six months in the precinct.

In New Jersey, one year in the State, five months in the county.

In New York, one year in the State, four months in the county, thirty days in the town, and thirty days in the precinct.

In North Carolina, two years in the State, six months in the county, and four months in the precinct.

In North Dakota, one year in the State, six months in the county, and ninety days in the precinct.

In Ohio, one year in the State, thirty days in the county, twenty days in the town, and twenty days in the precinct.

In Oklahoma, one year in the State, six months in the county, thirty days in the town, and thirty days in the precinct.

In Oregon, six months in the State.

In Pennsylvania, one year in the State and two months in the precinct.

In Rhode Island, two years in the State, and six months in the town.

In South Carolina, two years in the State, one year in the county, four months in the town, and four months in the precinct.

In South Dakota, six months in the State,

thirty days in the county, ten days in the town and ten days in the precinct.

In Tennessee, one year in the State, and six months in the county.

In Texas, one year in the State, six months in the county, and six months in the town.

In Utah, one year in the State, four months in the county, and sixty days in the precinct.

In Vermont, one year in the State, three months in the county, three months in the town and three months in the precinct.

In Virginia, two years in the State, one year in the county, one year in the town, and thirty days in the precinct.

In Washington, one year in the State, ninety days in the county, thirty days in the town, and thirty days in the precinct.

In West Virginia, one year in the State, sixty days in the county, and ten days in the town.

In Wisconsin, one year in the State, ten days in the county, ten days in the town, and ten days in the precinct.

In Wyoming, one year in the State, sixty days in the county, ten days in the town, and ten days in the precinct.

"By the Constitutions of many States, no person shall be deemed to have lost a residence for the purpose of voting,[1] by reason

of his absence from the State while employed in the service of the United States,[2] or of the State.[3] Or, while engaged in the navigation of the waters of this State or of the United States,[4] or temporarily absent from the State.[5] Or, while confined in prison,[6] or kept at an almshouse or asylum at the public expense.[7] Or while a student in any institution of learning.[8] And in several States no person shall be deemed to have gained a residence in the State by reason of his presence, for the various reasons respectively specified.[9]''

But the undergraduates of a college who are free from parental control and regard the place where the college is situated as their home, having no other to which to return in case of sickness or domestic affiliations are as much entitled to vote as any other resident of the town pursuing his usual vocation; but as a general fact, undergraduates of colleges are no more indentified with residents of the town in which they are pursuing their studies than the merest stranger.

Under Constitution of New York, Article 2, Section 3, which provides that no person can gain or lose his residence as a voter by his presence or absence as a student at a seminary, evidence that a student had entered a seminary for the purpose of becoming a

priest, and that no person is allowed to enter or remain in a seminary as a student unless he renounces all other residences or homes and that on his admission to the priesthood he continues in the seminary until assigned elsewhere, has been held not to be sufficient to change his legal residence, as the change of residence of a student must be proved by acts independent of his status as a student.[10]

Under Article 2, Section 3, of the New York Constitution, declaring that no person shall be deemed to have gained or lost a residence by reason of his presence or absence, while "kept" in any almhouse or other asylum or institution, wholly or partly supported at the public expense or by charity, an "unpaid helper" in Bellevue Hospital, who was simply an inmate with permission to use it as an asylum, receiving his boarding and lodging for the work, which he was required to do, was "kept" therein, within the meaning of the Constitution, and hence could not gain a residence entitling him to vote in the district.[11]

A person residing at the Samaritan Home for the aged does not, by such residence, acquire the right to vote at elections within the district wherein such home is located.[12]

Notes

1. Or for the purpose of holding office (Col., Ky., Tex.) or for any purpose whatever. (Ark., Cal., Ind., Wis.)

2. Ariz., 1693; Ark., 19, 7; Cal., 2, 4; 20, 12; Col., 7, 4; Ida., 6, 5; Ill., 7, 4; Ind., 2, 4; Kan., 5, 3; Me., 2, 1; Mich., 7, 5; Minn., 7, 3; Mo., 8, 7; Mon., 9, 3; N. D., 125; Nev., 2, 3; N. Y., 2, 3; Ore., 2, 4; Pa., 8, 13; S. C., 2, 7; S. D., 7, 6; Tex., 16, 9; Wash., 6, 4; Wis., 3, 3; Wym., 6, 7. These exceptions do not apply to a person serving out a sentence in a penitentiary for infamous crime.

3. Ark., Cal., Col., Ida., Ill., Ind., Ky., Me., Mich., Mo., Mon., N. D., Ore., Pa., S. D., Tex., Wash., Wis.

4. Ariz., Cal., Ida., Kan., La., Mich., Minn., Mo., Mon., Nev., N. Y., Ore., Pa., S. C., Wash., Or, in all these last, except Idaho and Minnesota, of the waters of the high seas.

5. Ala., 1, 31; Ariz., Ark., S. C., 1, 12.

6. Ariz., Cal., Col., Kan., Mich., Minn., Mo., Nev., N. Y., Ore., Pa.

7. Ariz., Cal., Col., Ida., Kan., La., Mich., Minn., Mo., Mon., Nev., N. Y., Ore., Pa., Va., Wash.

8. Ariz., Cal., Col., Ida., Kan., La., Mich., Minn., Mo., Nev., N. Y., Ore., Pa., S. C., Va. 24, Wash.

9. Ariz., Cal., Col., Ida., Kan., La., Mich., Mo., Mon., Nev., N. Y., Ore., Pa., S. C., Wash.

So, in Maine, as to paupers or asylum inmates only. Stimson's Federal & State Constitutions, Part III, § 242.

10. Order (Sup. 1899) 62 N. Y. S. 124. Affirmed In re Barry 58, N. E. 12, 164 N. Y. 18, 8 N. Y. Ann. Cas. 148.

11. Order 62 N. Y. S. 816, 48 App. Div. 203. Affirmed, People vs. Hagen, 58 N. E. 1091, 165 N. Y. 607.

12. Order (1900) 66 N. Y. S. 659, 54 App. Div. 630. Affirmed, In re Olwell, 59 N. W. 1128, 165 N. Y. 642.

Section 12. Special Disqualifications

Certain persons, who possess all the positive requirements for citizenship, are nevertheless, especially disqualified in every State. The classes of persons thus specially disqualified are persons of unsound mind, and certain classes of felons. Some States disqualify paupers.

The classes of persons disqualified from voting in the different States are as follows:

In Alabama, persons convicted of treason, embezzlement of public funds, malfeasance in office or other penitentiary offenses, idiots or insane.

In Arkansas, idiots, insane, convicts until pardoned, non-payment of poll tax.

In California, Chinese, insane, embezzlers of public moneys, convicts.

In Colorado, persons under guardianship, insane, idiots, prisoners convicted of bribery.

In Connecticut, persons convicted of felony or other infamous crime unless pardoned.

In Delaware, insane, idiots, felons, paupers.

In Florida, persons not registered, insane or under guardian, felons, convicts.

In Georgia, persons convicted of crime punishable by imprisonment, insane, delinquent taxpayers.

In Idaho, Chinese, Indians, insane, felons, polygamists, bigamists, traitors, bribers.

In Illinois, convicts of penitentiary until pardoned.

In Indiana, convicts and persons disqualified by judgment of a court, United States soldiers, marines and sailors.

In Iowa, idiots, insane, convicts.

In Kansas, insane, persons under guardianship, convicts, bribers, defrauders of the government and persons dishonorably discharged from service of United States.

In Kentucky, treason, felony, bribery, idiots, insane.

In Louisiana, idiots, insane, all crimes punishable by imprisonment, embezzling public funds unless pardoned.

In Maine, paupers, persons under guardianship, Indians not taxed.

In Maryland, persons convicted of larceny or other infamous crime, persons under guardianship, insane, idiots.

In Massachusetts, paupers (except United States soldiers), persons under guardianship.

In Michigan, Indians holding tribal relations, duelists and their abettors.

In Minnesota, treason, felony unless pardoned, insane, persons under guardianship, uncivilized Indians.

In Mississippi, insane, idiots, felons, delinquent taxpayers.

In Missouri, paupers, persons convicted of felony, or other infamous crime or misdemeanor or violating right of suffrage, unless pardoned; second conviction disfranchises.

In Montana, Indians, felons, idiots, insane.

In Nebraska, lunatics, persons convicted of treason or felony unless pardoned, United States soldiers and sailors.

In Nevada, insane, idiots, convicted of treason or felony, unamnestied confederates against the United States, Indians and Chinese.

In New Hampshire, paupers (except honorably discharged soldiers), persons excused from paying taxes at their own request.

In New Jersey, paupers, insane, idiots and persons convicted of crimes which exclude them from being witnesses unless pardoned.

In New York, persons convicted of bribery or any infamous crime unless pardoned, bettors on result of election, bribers for votes and the bribed.

In North Carolina, idiots, lunatics, convicted of felony or other infamous crimes, atheists.

In North Dakota, felons, idiots, convicts unless pardoned, United States soldiers and sailors.

In Ohio, idiots, insane, United States soldiers and sailors, felons unless restored to citizenship.

In Oklahoma, idiots, felons, paupers and lunatics.

In Oregon, idiots, insane, convicted felons, Chinese, United States soldiers and sailors.

In Pennsylvania, persons convicted of some offense forfeiting right of suffrage, non-taxpayers.

Rhode Island, paupers, lunatics, idiots, convicted of bribery or infamous crime until restored.

South Carolina, paupers, insane, idiots, convicted of treason, dueling or other infamous crime.

South Dakota, persons under guardian, idiots, insane, convicted of treason or felony unless pardoned.

In Tennessee, persons convicted of bribery or other infamous crime, failure to pay poll tax.

In Texas, idiots, lunatics, paupers, convicts, United States soldiers and sailors.

In Utah, idiots, insane, convicted of treason or violation of election laws.

In Vermont, unpardonable convicts, deserters from United States service during the war, ex-Confederates.

In Virginia, idiots, lunatics, convicts unless pardoned by the legislature.

In Washington, Indians not taxed.

In West Virginia, paupers, idiots, lunatics, convicts, bribers, United States soldiers and sailors.

In Wisconsin, insane, under guardian, convicts unless pardoned.

In Wyoming, idiots, insane, felons, persons unable to read the State Constitution.

CHAPTER III

REGISTRATION

Section 13. Constitutional Provisions as to Registration

In some of the States the State Constitution contains provisions as to the registration of voters. Several of these Constitutions expressly provide that there shall be registration of voters;[1] while in a few States the Constitution contains provisions against registration. In Arkansas registration laws are expressly prohibited by the Constitution, and in West Virginia the Constitution forbids the Legislature to establish any board of registration of voters and provides that no voter shall be deprived of his vote because his name is not registered as a voter.

Notes

1. E. G.: Alabama, Delaware, Florida, Georgia, Indiana, Kentucky, Louisiana, Maryland, Missouri, Nevada, New York, Oklahoma, Rhode Island, Pennsylvania, South Carolina, Virginia, Washington and Wyoming.

Section 14. Power of State Legislatures Over Registration

In the majority of the States the enactment of laws requiring the registration of voters as a prerequisite to voting is left to the discretion of the State Legislature. Under the powers of a quasi sovereign government, the legislative department of any State government has the power to pass registration laws, when such power is neither granted nor prohibited by the Constitution of the State; under the condition, however, that the registration laws must be such as are merely intended to aid in the determination of the qualifications of voters, and not such as to increase such qualifications.[1]

On the other hand, it is held that while constitutional provisions requiring the Legislature to pass registration laws are theoretically mandatory and not merely directory in their character, still nevertheless there is no authority with the power to compel the Legislature to pass such laws, and their failure to do so does not invalidate subsequent elections.

In Stallcup vs. Tacoma[2] the Supreme Court of the State of Washington, in construing Article 6, Section 7, of the State

Constitution, which provided as follows: "The Legislature shall enact a registration law, and shall require a compliance with such law before any elector shall be allowed to vote; provided, that this provision is not compulsory upon the Legislature except as to cities and towns having a population of over five hundred inhabitants. In all other cases the Legislature may or may not require registration as a prerequisite to the right to vote, and the same system of registration need not be adopted for both classes," said:

"Our conclusion is that the right to vote in this State at any election, general or special, resides in those possessing the qualifications prescribed by Section 1, Article 6, of the Constitution, subject only to compliance with such reasonable provisions respecting registration and regulating the exercise of the right, as the Legislature may provide, but the mere failure or neglect of the Legislature to make any provision for registration does not operate to deprive those having the qualifications of the Constitution from exercising the elective franchise."

"The Constitution of South Carolina, adopted in 1868, required the Legislature to pass a registration law, but none had been passed before the presidential election in

1876. Objections to counting the electoral vote of the State, for this reason, were made before the Electoral Commission. In reply to these objections it was said that the Constitution of the United States had devolved the duty of directing the manner of appointing Presidential Electors on the Legislatures of the States, and that the requirement of the State Constitution could not bind the Legislature so far as such elections were concerned. There was no difference of opinion upon this point between the commissioners, Messrs. Abbott and Bayard, expressly holding it to be of no validity. Mr. Commissioner Abbott, in speaking of the laws of the State as being calculated to promote fraud, said: 'But although this is reprehensible in the highest degree, and shows the fraudulent intent of the party in power, I agree it does not furnish a sufficient reason to reject the vote of the State. The law certainly is mandatory upon the legislature, but if that body refuses to obey to do its duty, and execute the mandate, by making a law to provide for registration, such a refusal, however fraudulent, cannot deprive the State and its people of the right to vote. Any other construction would put an end to the govern-

ment and prevent the people from electing any officers, State or National.' ''[3]

Notes

1. Byler vs. Asher, 479 Ill. 101; Caper vs. Foster, 12 Pickering (Mass.) 485; Page vs. Allen, 58 Pa. St. 338, 98 Am. Dec. 272.

2. 13 Washington 142. The validity of the same election was also in question in the case of Seymour vs. Tacoma, 6 Washington 138.

3. Cong. Rec. Vol. 5, pt. 4, 237 and Am. & Eng. Encyc. of Law, second edition, Vol. X, page 611, note.

Section 15. General Application of Registration Laws. Exceptions

It is not necessary (in the absence of any constitutional provision on the point) that a State Legislature in passing a registration law should make it of universal application. In many States the registration laws only apply to cities of over a certain population. Where, however, the registration laws are made to apply to certain localities and not to others, the classification must not be an arbitrary one, but must be based upon some reasonable ground of distinction.

A law of this character was construed in State vs. Shepherd,[1] where it was held that:

"The Kansas Act of March 2, 1889 (Laws 1889, c. 206), relating to the registration of voters in cities of the first class, where the metropolitan police law is or may be in force, and where more than six thousand votes were cast at the general election in November, 1888, or shall be so cast at any future general election, applied only to cities of the first class where more than six thousand votes have been cast either at the general election in November, 1888, or at some general election since then."

The question has often arisen as to whether a general registration law should be held to apply in the case of special elections. In Ben vs. State[2] it was held that the provision of the Mississippi Constitution providing that "electors shall not be registered within four months next before any election at which they may offer to vote," did not apply to local option elections. In Seymour vs. Tacoma[3] it was held that a law requiring the registration of voters for all elections for municipal and other offices did not apply to elections held to vote upon propositions for the purchase of water works and light plants by a city.

Notes

1. 42 Kan. 360.

2. 71 Miss. 1.
3. 6 Wash. 138.

Section 16. Registration Officials

The qualifications and methods of appointment of election officials differ so greatly in the different States that no general statements on this subject can be made in a book of this size. In some States the registration officials are the same as the election officials, while in other States the two sets of officials are different men.

CHAPTER IV

POLITICAL PARTIES

Section 17. Party Organization and Party Names

Government in the United States has always been distinctively a government by political parties. For a long period, during the early history of the Republic, the political parties were entirely extra-judicial, and no control over such parties, their committees or conventions was attempted by the courts. The increasing importance of the political organizations has brought about an ever increasing degree of supervision over them on the part of the Judicial Department of the Government.[1]

One of the first requisites for a political party is some distinctive party name. Party names must be distinctive and not conflict with names of previously existing parties. In Lind vs. Scott[2] the name "Social Democratic Party" was held to conflict with the name "Democratic Party." A substantial number of persons having an organization, committees and a distinctive platform, is a

political party and entitled to protection in the use of a political name, even although they do not poll a sufficient number of votes to have the names of their candidates appear upon the ballot otherwise than by petition.[3]

Notes

1. See Sections 19 and 20.
2. 87 Minn. 226.
3. Davidson vs. Hanson, 87 Minn. 211.

Section 18. Political Committees

The general government of all political parties is vested in its permanent political committees. The members of such committees were formerly always chosen by the various political conventions, now they are very often elected directly at the direct primaries of their parties.

At the head of the party stands the National Committee of the party. Unlike other political committees, such committees are still nearly independent of the law. It is only incidentally that a State statute relative to primaries or elections can in any way affect a National Committee or a National Convention. The results of an election for delegates to a National Convention, held in accordance with a State primary law, may

be accepted or rejected by the National Committee, or the National Convention, and there is no way in which such proceedings could be reviewed by the courts.

In every local political division there are to be found political committees of each of the large political parties. There are county committees, town committees, city committees, and very often ward committees, which are branches of the city committee of the city in which they are located. There are also committees for districts created solely as election districts for certain officials. Thus there are congressional district committees and senatorial district committees. All of these committees are under the supervision of the State Central Committee of the party. Many of these political committees have nominal duties and do very little work. The important local political committees are the county committee and the town or city committee. The relative importance of the county and town committees varies greatly in the different States, as the importance of the county and town governments vary in the States. In most of the States the county committees do the great part of the political work of the party; in others, as, for example, Massachusetts, they are hardly more impor-

tant than the committee for a senatorial district.

"Primary election laws usually intrust the calling of elections to the party governing committees[1] subject to statutory limitations on their mode of action.[2] A power to the state committee to count the votes cast at a primary election for State officers will be read into a statute which authorizes the committee to call the convention and authorizes local committees to count the vote and certify the nominations for local officers.[3] Redress must be first sought from the committee before mandamus or certiorari will lie to review its action."[4 5]

Notes

1. When called under such statutory provisions they cannot be enjoined (Ky. St., Art. 12, c. 41), Meacham vs. Young, 24 Ky. L. R. 2141, 72 S. W. 1094. State committee denied power to prevent primary called regularly by local committee or to remove local committeemen and appoint new committee for that end. Neal vs. Young, 25 Ky. L. R. 183, 72 S. W. 1082. Interference by state committee enjoined. Id. governing committee cannot question the eligibility of a candidate before the primary and refuse to place his name on the ballot. Young vs. Beckham, 24 L. R. 2134, 72 S. W. 1092.

2. A statute providing that rules shall not be amended except on reasonable notice, does not apply to rules adopted by the first meeting of a county general committee changing rules of the preceding year. (Primary Election Law, Laws, 1898, p. 336, c. 179, as amended by Laws, 1899, p. 968, c. 473, subd. 2), People vs. Democratic General Committee, 82 App. Div. (N. Y.) 173. And a rule there adopted controls acts performed at that time, though it later may become ineffective on account of failure to file a certificate thereof as required by statute. Id.

3. Ky. St., Art. 12, pp. 1563, 1565; Young vs. Beckman, 24 Ky. L. R. 2135, 72 S. W. 1092.

4. Mandamus will not issue to compel the recognition of an unnamed person as member of the general committee of a party, if such person has never applied for, or been refused recognition, though by the statute summary jurisdiction is given to review the actions or neglect of the officers or members of a political convention committee. People vs. Democratic Committee, 82 App. Dic. (N. Y.) 172.

5. Current Law.

Section 19. Political Conventions

A political convention is a representative body of a particular political party. It is composed of delegates elected by the voters of the party either directly at primaries or

caucuses, or indirectly by other conventions. Very often an alternate for each delegate is elected at the same time as the delegate himself, to take the latter's place at the convention if he is absent. Conventions vary greatly in the numbers of the delegates composing them; a national convention of either of the two great political parties has about eleven hundred delegates, a State convention may have as many as fifteen hundred, while at the other extreme a local convention may be composed of only a handful of delegates.

National political conventions are held every four years in presidential years. In the national convention of the great political parties each State has twice as many delegates as it has members in both houses of Congress combined, and representation is also given to the Territories. The total number of delegates in these conventions is thus in the neighborhood of eleven hundred. All of these delegates up to the campaign of 1912 were elected by preliminary conventions in the different States, Territories, or congressional districts.

The delegates to most political conventions, other than national, are elected directly in the party primaries or caucuses. Some of the State conventions have more delegates

than the national conventions, but most of the local conventions are quite small. Sometimes county conventions choose the delegates to the State conventions.

The first thing to be done in every convention is to decide who are entitled to take part in effecting the organization of the convention. The general procedure is for the appropriate political committee of the party (i. e., national committee in the case of a national convention, State committee in the case of a State convention, county committee in the case of a county convention, etc.) to make up a list of delegates who are thus entitled to take part in the preliminary business of the convention. The general custom is not to place on this temporary roll of delegates the names of any persons whose claim to a seat is disputed, it being considered best to leave it to the delegates whose claim to a seat is undisputed to pass upon the contested cases. If a delegate whose seat is contested is admitted, he will generally not vote on the question of his own right to a seat. Occasionally in the case of an unscrupulous committee, delegates whose right to vote is disputed will be admitted and allowed to vote on the question of their own right to a seat.

The chairman of the political committee of

the party calls the convention to order. A temporary organization is next effected by the election of a temporary chairman, temporary secretary and whatever other temporary officers the convention may decide upon. Following this a committee on credentials is appointed to decide who are entitled to act as delegates in the convention. Upon their report having been acted upon by the convention, the convention is ready for its permanent organization, which is effected by the election of the regular permanent officials.

The principal work of all political conventions is the nomination of the party candidates for various offices, and the election of delegates to higher conventions. In national conventions the nominations are made by a roll call of the States, and in State conventions generally by a roll call of the counties. Nominations are sometimes made by acclamation and sometimes by written ballots. A candidate must always receive a majority vote in order to be nominated.

National conventions always, State conventions almost always, and other conventions very rarely, adopt political platforms which are official statements of the position and views of the party on pending political

issues. These platforms are adopted by the convention before the nomination of the candidates.

The final duty of political conventions is the election of campaign committees.

Section 20. Control of the Courts Over Political Conventions

The importance of the political convention during a long period in the history of the United States has compelled the Legislature and courts to assume a certain degree of control over such conventions. While political conventions are primarily under the control of the committees of the political parties, nevertheless, statutory requirements regulating the same are legal and binding, unless they are of such a character as to violate the constitutional guarantees of freedom of election, or freedom of speech and assemblage.[1] Among the statutory provisions relative to political conventions which have been upheld are ones regulating who should call the convention to order,[2] administer the oath to the temporary chairman,[3] and call the roll.[4]

The powers of a convention are of a temporary and limited character.[5] The power of a convention is over when the nominations have been made and the certificates filed.[6]

Vacancies caused by the declination of candidates are filled by the proper political committees.[7]

A majority of the delegates in a political convention have the full right to control the convention, and may adopt any legal methods to carry out the business so as to give effect to the will of the majority.[8] Thus it has been held that when a combination of legal and illegal delegates by unlawful means deprive the majority of the legal delegates of their right to organize the convention, the majority members may proceed to organize the convention either in the hall or elsewhere.[9]

A majority of the delegates voting is sufficient to control the convention;[10] the legality of the work of the convention cannot be defeated by the action of delegates in sitting silent while a vote is being taken, or by delegates withdrawing after the balloting is completed.[11] This is true even although the delegates who withdrew constitute a majority of the members of the convention, and unite with rejected delegates to hold another convention.[12]

A convention, legal and regular for one purpose is legal and regular for all purposes.[13]

The decision of the central organization of

a political party as to which is the legal convention of the party is generally binding upon the courts.

Notes

1. State vs. Junkin (Neb.) 122 N. W. Rep. 473.
2. In re Thomas, 128 App. Div. 330, 122 N. Y. Supp. 664.
3. In re Byrne, 128 App. Div. 334, 122 N. Y. Supp. 699.
4. Id.
5. In re Greene, 121 App. Div. 693, 106 N. Y. Supp. 425.
6. In re Greene, 121 App. Div. 693, 106 N. Y. Supp. 425; State vs. Benton, 13 Mont. 306, 34 Pac. 301.
7. Id.
8. Wallace vs. Lansdon (Idaho), 97 Pac. Rep. 396.
9. Id.
10. State vs. Porter, 11 N. D. 309.
11. Id.
12. Id.
13. State vs. Lindahl, 11 N. D. 320.
14. Rose vs. Bennett (R. I.), 56 Atl. Rep. 185; State vs. Lindahl, 11 N. D. 320.

CHAPTER V

PRIMARY ELECTION LAWS

Section 21. General Right to Pass Primary Election Laws

That the State Legislatures have the general power to pass reasonable primary laws is now well settled.[1] "Primary elections, as they in fact exist, are so far matters of public concern that they are proper objects of legislative oversight."[2]

A primary election law may provide for the nomination of candidates by direct vote of the members of the various political parties, or it may provide for the making of nominations by conventions. The primary laws whose constitutionality has been questioned in the courts have been almost invariably those of the first class. A primary law may also make provisions as to the organization and government of a political party, and as to who shall be entitled to vote in the primaries of a political party.

When a direct primary law is adopted by a State, the previously existing laws governing party organizations, political committees, conventions, etc., remain in force, except such

parts of the laws as are repealed by the new law, either expressly or by necessary implication.

Notes

1. People ex rel. Breckon vs. Board of Election Commissioners, 221 Ill. 9; Dapper vs. Smith, 138 Mich. 104, 101 N. W. Rep. 60; Leonard vs. Conn., 112 Pa. St. 622. But, contra, Britton vs. Election Commissioners, 129 Cal. 337.
2. Hopper vs. Stack, 69 N. J. L. 569, 58 Atl. Rep. 1.

Section 22. Cases Where Particular Primary Election Laws Have Been Declared Constitutional

In Hopper vs. Stack,[1] a provision of the New Jersey law that a primary voter, if challenged, must make affidavit that at the last general election he voted for a majority of the candidates of the party, at whose primary he seeks to vote, was held constitutional.

Statutes limiting the operation of the primary election laws to the two largest parties in the State, or to those parties which poll a certain per cent of the total vote of the State, have been upheld in a number of decisions.[2]

In State vs. Moore,[3] a provision of the Minnesota election laws, which prohibited an un-

successful candidate for nomination for a certain office at the primaries of one of the political parties from having his name printed on the election ballot as an independent, was upheld.

A primary election law is not unconstitutional because a voter who votes at a primary held to nominate candidates for a certain election is prohibited from signing the petition of another candidate for the same election, either an independent or one belonging to another political party.[4]

A law is not unconstitutional on account of its unreasonableness, because under its provisions a voter who changes his party affiliations between registration and primary day will thereby lose his right to vote at the primary election of either party;[5] nor is a law unconstitutional because voters are required to declare their political affiliation with a certain political party and promise to support its candidates at the election before being permitted to vote at the primary election of such party.[6]

A primary election law is not an infringement of the elective franchise because it prescribes an exclusive method of making nominations; the right to vote not being a natural right, and being subject in all respects to the

control of the Legislature in each State, except as the power of the Legislature is limited by constitutional provisions, either Federal or State.

The requirement that candidates for nomination for any office shall be obliged to pay a reasonable fee, to be used towards defraying the expenses of the primary election, has been upheld in a number of decisions.[7]

The cases already cited in this section show the great extent of the control which the State may exercise over primary elections; on the other hand, the State may, if it deems proper, allow each political party to prescribe the time, manner and conditions of election, and the qualifications of party voters. The present tendency is strongly in the direction of greater control of primary elections by the State.

Notes

1. 69 N. J. L. 562.
2. Kennenviw vs. Allegany County, 102 Md. 110; State vs. Drexel, 105 N. W. Rep. 174 (Neb.)
3. 87 Minn. 308.
4. Katz vs. Fitzgerald, 152 Cal. 433, 93 Pac. Rep. 112.
5. Schastag vs. Cator, 151 Cal. 600, 91

Pac. Rep. 502.

6. Id.

7. State vs. Scott, 108 N. W. Rep. 828 (Minn.); Kennewig vs. Allegany County, 102 Md. 119, 62 Atl. Rep. 249; Montgomery vs. Chelf, 118 Ky. 766, 82 S. W. Rep. 388.

Section 23. Cases Where Particular Primary Election Laws Have Been Declared Unconstitutional

Primary election laws have been more severely handled by the courts in Illinois than in any other State in the country.

In People ex rel Breckon vs. Board of Election Commissioners of Chicago,[1] the Illinois Direct Primary Act of May 18, 1905, was declared unconstitutional for the following reasons:

(1) The statute contained an unconstitutional delegation of legislative power in the provision which gave to the county central committee of each political party the right to determine whether county candidates should be nominated by conventions or by direct primaries, and if they were to be nominated by direct primaries, whether a majority vote or a plurality vote should be required for a nomination.

(2) The statute violated Article IV, Section 13 of the Illinois Constitution, by amend-

ing the Illinois Primary Election Act by reference to its title only.

(3) It contained provisions as to the counties from which legislative candidates should come, thus imposing qualifications for office beyond those fixed by the Illinois Constitution.

(4) It provided one system of primary elections for one county in the State, and another system for the other counties, and thus violated the Constitutional guarantee that all elections should be free and equal.

(5) The provisions as to the fees to be paid by candidates bore no relation to the service to be rendered and the rights both of candidates and of voters.

The Direct Primary Act of July 1, 1906, was declared unconstitutional in the case of Rouse vs. Thompson.[2] The provisions authorizing primary elections to select candidates of the several political parties to be voted for in political conventions, were held not to be within the scope of the title of this Act, which was: "An act to provide for the holding and regulating of primary elections of delegates to nominating conventions, for the holding of such conventions, filling vacancies and fixing penalties for the violation of the provisions thereof."

Sections 2 and 3 of the Act, which author-

ized the County Central Committees of the different parties to designate election districts, were held to contain an unconstitutional delegation of power.

Section 59, which authorized political committees to select the candidates of the various parties in the case of special elections was held (when compared to the procedure provided for in the case of general elections) to be in violation of the provision of the Illinois Constitution that all elections should be free and equal.

Another ground upon which the statute was declared unconstitutional was, that legally qualified voters would be deprived of the right to vote at every primary on account of the fact that neither was a registration provided for within thirty days of the date of the primary election, nor was any provision made by which a voter, entitled to vote under the Illinois Constitution, but not registered, could swear in his vote.

A final ground of objection to the bill was found in the provision that only one candidate for representative to the Legislature could be nominated in each senatorial district by any party; thus taking away from the voter his right to vote for three candidates.

The provisions of this statute which limited the right of participation in a primary

election of a party to those who had not voted at the primary election of another party, or signed the nomination petition of the candidate of another party, within one year prior to the primary which the voter seeks to participate in, and who will declare their political affiliations, were held constitutional.

The Direct Primary Act of 1908 was held to be unconstitutional in the case of People vs. Strassheim.[3]

This Act was held void for the following reasons:

(1) No proper provisions were made for registration for the date of primary elections. This not only illegally deprived certain voters of the right to vote, but, as registration was required in some portions of the State and not in others, the law as it stood violated the constitutional guarantee that all elections should be free and equal.

(2) Voters, in voting for representatives to the Legislature, were deprived of their right to either cumulate their votes or to vote for more than one person at their own option.

Notes

1. 221 Ill. 9.
2. 228 Ill. 522, 81 N. E. 1109.
3. 240 Ill. 179, 88 N. E. Rep. 821.

CHAPTER VI

CONDUCT OF ELECTIONS

Section 24. Calling Elections.

In order to render an election valid it must not only be authorized by law, but must be called by officials authorized by law to call the election.[1] It is sufficient, however, if the officer who calls the election is a de facto officer. The official in calling the election must always observe the method, if any, prescribed by law for calling the election, or such election will be void.[2] When, however, all the details of this election, including the time and place of holding it, are fixed by statute, the election will not be invalid because no notice or proclamation relative to the election was issued.[3]

Again, while in some States the statutes require the county judge or some other judicial official to issue writs of election, the mere fact that such writs were not issued will not render the election void.[4] Even in the case of special elections, or elections to fill vacancies, while a notice is invariably required to

be issued, still, if there is no notice or proclamation made, but if the size of the vote shows that the voters had general knowledge of the election, the election will be upheld.[5] Where the statute requires a certain number of days' notice to be given of the election or designates what facts shall be set out in the notice, these provisions should be complied with, but a substantial compliance with the statute is sufficient.[6]

The statutes generally require that notices as to elections shall be published in a newspaper or newspapers or posted in a certain number of public places, or both. Only such publication or posting as the statute requires is necessary; and a substantial compliance with such statutory requirements is sufficient.[7]

Defects or neglect in the posting or publication of the notices will not render the election void where the defects were immaterial and did not affect the result.[8]

Notes

1. Clarke vs. Harrcock County, 27 Ill. 305; Stephens vs. People, 89 Ill. 337; State vs. Buck, 13 Neb. 273.

2. McHam vs. Connell (Tex. App.), 15 S. W. Rep. 284.

3. Stephens vs. People, 89 Ill. 337; Jones vs. Gridley, 20 Kan. 584.

4. Ex parte Schilling (Tex. Crim. App., 1897), 42 S. W. Rep. 553.

5. Ellis vs. Karl, 7 Neb. 381; Adsit vs. Osmun, 84 Mich. 420.

6. Chicago, etc., R. Co. vs. Pickney, 74 Ill. 277; Tillson vs. Ford, 53 Cal. 701.

7. Seymour vs. Tacoma, 6 Wash. 427.

8. People vs. Avery, 102 Mich. 572.

Section 25. Election Officers

The numbers, titles and qualifications and method of appointment of election officers are regulated by statute and differ greatly in the different states. Election officers are very seldom elected, and are generally appointed by some of the executive officers of the government. In some States, however, the statute provides that the election officer shall be appointed by the judge of some court, and such statutes have been held to be constitutional, although they confer non-judicial powers upon a judge.[1]

Various qualifications are prescribed in the several States for election officers. It is generally provided that such officials must be citizens and residents of the election district in which they serve, and able to read and write. In some States, however, an elec-

tion official can serve in a different precinct from that in which he lives. Other qualifications are found in different States.

In Illinois the judges of election must be "householders"; but no such requirement is made as to the clerks of election. It is nearly everywhere provided that the election officers at each voting place shall contain representatives from the two leading political parties.

Election officers are not judicial officers when deciding upon the questions of receiving or rejecting votes; they act in a ministerial, or, at most, in a quasi-judicial character.[2] Not being judicial officers, election officials are liable to an action for damages for illegally refusing to receive a vote.[3] Election officials may also be liable criminally when they wilfullly reject a legal vote or accept an illegal one. The action of election officers in receiving or rejecting votes is, of course, always open to review in any election contest before a court or legislative body.

Notes

1. People vs. Hoffman, 116 Ill. 587; Ex parte Siebold, 100 U. S. 331.
2. Biddle vs. Wing, Cl. & H. El. Cas. 504.
3. See Section 3.

Section 26. Time of Holding Election

Statute provisions providing the time at which the election shall be held are mandatory and not directory, and an election held at some other time will be void.[1] An election held at the wrong time, even with the consent of all the voters, will be void.[2]

A majority can not change the time of election against the will of the minority.[3]

Thus, in People vs. Brewer,[4] where, upon the day fixed for an election of a school trustee, a majority of the voters organized and, against the will of the minority, adjourned the election to a future day, it was held that an organization and election by the voters remaining was legal, and also that where a majority attempts to adjourn an election without day, the minority may organize on the proper day and hold the election.

There must be some definite time legally fixed for holding an election, otherwise the election will be void. In Toney vs. Harris,[5] the court said:

"To make the election of an officer of government legal, there must be a time fixed for holding such election, either by law or by the officer empowered by law to do so. If it was not so, there could be neither a fair, orderly, or free expression of the popular choice. If

one candidate for an office and his friends may, without authority of law, prescribe the time for holding an election to fill a vacancy, his opponent may as well fix another and different time. For neither by the constitution nor statute is the first Monday in August prescribed as the day in course for holding an election to fill a vacancy in the office of judge of the circuit or other courts of the same class, and such election, therefore, can be legally held on that day only when appointed by a writ of election. To sanction an election held without lawful authority is to countenance confusion, tumult and unfairness.''

If the Constitution fixes the date for an election, such date cannot be changed by the Legislature.[6] The Constitution or laws of the States sometimes give to some State or local officer or board the power to fix the date of an election. In such cases, if the power is exercised in the proper manner, the election will be valid.

Notes

1. Stephen vs. People, 89 Ill. 337; Field vs. Hall (Texas), 40 S. W. 789.
2. State vs. Winter, 141 Ind. 177.
3. State vs. Collins, 2 Nev. 351.

4. 20 Ill. 474; American and English Encyclopedia of Law, p. 679.
5. 85 Ky. 453.
6. Smith vs. Askew, 48 Ark. 82.

Section 27. Place of Holding an Election

In order for an election to be legal the place of voting must be definitely fixed before the balloting begins.

In Williams vs. Porter,[1] where a statute required the polling places, when more than one was demanded by the excess of the number of voters over those voting at the last preceding general election, to be fixed by the county board, and it appeared that a schoolhouse, where certain votes were cast at an election, had not been designated or appointed by the county board as a polling place, it was held that such votes could not be counted. It was said: "A number of voters of the township assemble at a place unauthorized by law, organize, and hold an election for town officers, and the question is, shall the votes cast at such election be counted? . . . It is clear, upon the plainest principles of law, they cannot be so counted. The whole thing, however well intended, was, in contemplation of law, illegal and void."

When a place has been fixed the election

must be held at this place, but if it becomes impossible to hold the election at the place designated and the polling place is moved to some other place in the immediate vicinity, and the voters notified of the change, in the absence of fraud the election will be upheld.[2]

The statute of each State prescribed what officer or body shall have the power to divide the State into voting precincts and fixes the polling places in each precinct.

Notes

1. 114 Ill. 628. But contra Steele vs. Calhoun, 61 Mass. 556.
2. Dale vs. Irwin, 78 Ill. 170.

Section 28. Voting

Voting in this country is now everywhere by ballot, and almost everywhere under some form of the Australian Ballot System, except in places where voting by voting machines has been introduced. The Australian Ballot System is treated in the next chapter of this book, and voting machines in the succeeding one.

The voter in voting is entitled to secrecy, but under certain circumstances, if he is unable to mark his ballot himself he may have the assistance of some of the election officials. Physical incapacity to mark his ballot on

account of blindness, loss of hands, or other causes, will always entitle the voter to such assistance. Inability to read entitles the voter to assistance except in those States having educational qualifications.

The manner of rendering assistance in such cases, and the official by whom it shall be rendered, are designated by statute. It is generally provided that two election officials, one from each of the two leading political parties must give such assistance together.

A voter who is rendered assistance in marking his ballot is entitled to as great a degree of secrecy as is possible under the circumstances; the officers who assist him have no right to divulge how he votes.

CHAPTER VII

AUSTRALIAN BALLOT SYSTEM

Section 29. History of the Australian Ballot System

The Australian ballot system, which in some form or another is now in force throughout the United States, derives its name from the fact that it was first put into operation in Australia.[1] Such a system of voting was first proposed in the Legislature of South Australia by Francis S. Dutton in 1851, and became a law, under the title of the Elections Act, in 1857. In the next fifteen years this system of voting was adopted by all the other Australian colonies and by New Zealand.

By Act of May 30, 1872, the Australian ballot was adopted for parliamentary elections in England; and this system was next adopted in Belgium in 1877, by Luxumberg in 1879, by Italy in 1882, and by Norway in 1884.

The first law providing for the adoption of the Australian ballot in the United States

was that of February 24, 1888, which prescribed this method of voting for municipal elections in Louisville, Kentucky, although some features of the Australian ballot had been copied in a statute of Wisconsin, governing elections in cities of over 50,000 population, passed in 1887.

In 1888 the Legislature of New York passed the Yates-Saxton Act for the adoption of the Australian ballot system, but the bill was vetoed by Governor David B. Hill.

Massachusetts was the first State to adopt the principles of the Australian ballot for general elections; the bill which accomplished this being signed by the Governor May 30, 1888.[2] Within the next seven years every State in the country had followed the example of Massachusetts except Georgia, Louisiana, North Carolina and South Carolina. Great differences as to details are found in the laws of the different States.

Notes

1. It was claimed during the hearing before the British Parliamentary Committee in 1869, that this system was copied from the system of voting which had been adopted in the town of Maryport in Cumberland (England).

2. It is interesting to note that a similar

method of conducting elections had been advocated in this State by the "Know-Nothing" Party in 1850-51.

Section 30. General Characteristic of the Australian Ballot System

The two great features of the Australian ballot system are the furnishing of the ballots by the government and secrecy of voting.

"The essential feature of the plan is that all candidates in the field for any office shall be placed on one ballot, and the voter compelled to indicate his preference by a mark against one; thus forcing him to think personally concerning each one, inviting to independence of judgment, breaking down the tyranny of the party vote, and putting some intelligence into the 'brute vote' even though the name of the party of each candidate is added."[1]

The Australian ballot is supposed to accomplish two great results: (1) Prevent the intimidation of the honest voter; and (2) decrease bribery in elections by rendering it impossible to be known whether the voter who has sold his vote actually votes the way he has been bribed to vote.

Note

1. Americana, Volume II.

Section 31. Form of the Australian Ballot

Two general forms of the Australian ballot are to be found in this country. The first American law passed on this subject (that of Massachusetts) provided that the candidates for office should be grouped according to the office for which they were candidates, and the names of the candidates in each group arranged alphabetically. Under this form of the ballot it is not possible to vote a straight party ticket by making a single cross. This form of the ballot carries out the idea of the Australian ballot to the extreme, and although the example of Massachusetts has been followed by some States, this is further than most States seem willing to go. The most common form of the Australian ballot is the one where the names of the candidates are arranged in party columns, and which permits a voter to vote the straight ticket of his party by putting a cross in the "circle" at the head of the column. Under some of the earlier Australian ballot laws the names of the candidates of the different parties were printed on separate ballots, all to be furnished by the State. Such a law can hardly be said to provide for the true Australian ballot system.

In some States a special distinguishing

party device or emblem is printed at the head of each party column, in other States this is lacking. In some States the cross must be placed at the left of the names of the candidates for whom the voter votes, and in other States at the right of such names.

The general characteristics of the two kinds of Australian ballots will be seen from the following samples of ballots used in Massachusetts and in Illinois:

(Form of Massachusetts Ballot) (1)

OFFICIAL BALLOT FOR PRECINCT ONE, WARD ONE OF CAMBRIDGE, 8TH NOVEMBER, 1887

For Governor

VOTE FOR ONE

Oliver Ames of Easton
Republican

William Earle of Worcester
Prohibition

Henry B. Lovering of Lynn
Democrat

For Lieutenant-Governor

VOTE FOR ONE

John Blackmer of Springfield
Prohibition

John Q. A. Brackett of Arlington
Republican

Walter Cutting of Pittsfield
Democrat

For Secretary of the Commonwealth

VOTE FOR ONE

Amos E. Hall of Chelsea
Prohibition
John F. Murphy of Lowell
Democrat
Henry B. Peirce of Abington,
Republican

For Treasurer and Receiver-General

VOTE FOR ONE

Alanson W. Beard of Boston
Republican
John L. Kilton of Lee
Prohibition
Henry C. Thacher of Yarmouth
Democrat

For Auditor of Accounts

VOTE FOR ONE

William F. Cook of Springfield
Democrat
Charles R. Ladd of Springfield
Republican
Edmund M. Stone of Hudson
Prohibition

For Attorney-General

VOTE FOR ONE

Allen Coffin of Nantucket
Prohibition

John W. Corcoran of Clinton
Democrat

Andrew J. Waterman of Pittsfield
Republican

For Executive Councillor, Third District

VOTE FOR ONE

Robert Luce of Somerville
Democrat

Ebenezor N. McPherson of Boston
Republican

John S. Paine of Cambridge
Prohibition

For County Commissioner

VOTE FOR ONE

Joseph W. Barber of Sherborn
Prohibition

J. Henry Read of Westford
Republican

James Skinner of Woburn
Democrat

For Senator, Third Middlesex District

VOTE FOR ONE

George W. Gale of Cambridge
Democrat

Chester W. Kingsley of Cambridge
Prohibition

For Representatives to the General Court, First Middlesex District

VOTE FOR TWO

Walter H. Marble of Cambridge
Prohibition
Isaac McLean of Cambridge
Democrat
George A. Perkins of Cambridge
Democrat
John Reed of Cambridge
Democrat
Chester F. Savage of Cambridge
Republican
Will A. Start of Cambridge
Prohibition

Question Submitted to the Vote of the People

Shall licenses be granted for the sale of Intoxicating Liquors in this city?
Yes
No

The following form is prescribed by the Illinois statutes:

"As nearly as practicable the ballot shall be in the following form:

O Republican

[ ] **For Governor**
JOSEPH W. FIFER

[ ] **For Lieutenant-Governor**
LYMAN B. RAY

[ ] **For Secretary of State**
L. N. PEARSON

O Democratic

[ ] **For Governor**
JOHN M. PALMER

[ ] **For Lieutenant-Governor**
ARTHUR J. BELL

[ ] **For Secretary of State**
NEWELL D. RICKS

O Prohibition

[ ] **For Governor**
DAVID H. HARTS

[ ] **For Lieutenant-Governor**
JOS. L. WHITLOCK

[ ] **For Secretary of State**
JAMES R. HANNA

(And continuing in like manner as to all candidates to be voted for at such election.)''

Notes

1. From Wigmore's "Australian Ballot System."

Section 32. Constitutionality of Australian Ballot System

The constitutionality of the Australian ballot system, in general, is now well established, having been upheld by a long line of decisions.[1]

In Independence Party Nomination,[2] however, the court held: "It is never to be overlooked . . . that the requirement of the use of an official ballot is a questionable exercise of legislative power and even in the most favorable view treads closely on the border of a void interference with the individual elector. Every doubt, therefore, in the construction of the statute must be resolved in favor of the elector."

The constitutionality of a number of special provisions in Australian ballot laws have been passed upon by the courts.

In Oughton vs. Black[3] the provision of the law allowing voters who wish to vote a straight party ticket to do so by putting a cross in the circle at the top of the party column, was held valid and not in violation of the provision of the Pennsylvania Consti-

tution, that "elections shall be free and equal."

In Cole vs. Tucker,[4] it was decided in Massachusetts that a provision in the law making it compulsory in the election of city officers and optional in the election of town officers, did not make such law unconstitutional as unequal in its operation upon the rights of voters.

Provisions that only the names of candidates of parties which received a certain per cent of the votes cast at the last general election and of candidates who filed independent petitions signed by a designated number of voters shall be placed upon the ballot, is constitutional.[5]

A statutory provision, which prevents a voter from writing in, on the official ballot, the name of a candidate for whom he desires to vote, has been held not to be unconstitutional when the voter had the same right as every other voter to secure, or to aid in securing, the printing of the name of his candidate upon such official ballot.[6]

But, in Rogers vs. Jacob,[7] it was held that a statute requiring each voter to retire to a compartment and there, alone and unaided, indicate by a mark on his ballot the various candidates for numerous offices he wishes to

vote for, practically operates to deprive those unable to read or write of a free and intelligent choice, and is to that extent invalid on the ground that illiterate persons have the right to avail themselves of whatever reasonable aid and information may be necessary to enable them to cast their ballots understandingly.

In Detroit vs. Rush,[8] the court said: "It is objected that the law deprives those who cannot read, the blind, and cripples who cannot walk, of the opportunity and means of voting. If such were the effect, the law would clearly be void, for they are given this right by the Constitution. We are cited to Rogers vs. Jacob, 88 Ky., 502, as a case in point. But the statute there under consideration provided that the voter must resort to the booth, and there, 'alone and unaided,' prepare his ballot. It is contended that under the act in question the result is the same, because no one is permitted to accompany the voter to the booth to assist him. It is to be regretted that the Legislature did not expressly provide for furnishing ballots to this class of voters. We must, therefore, carefully examine the act to ascertain if it leaves no way for such voters to obtain ballots. It is clear that if voters are limited to

the use of tickets provided in the booths, then some voters are disfranchised by the very terms of the law. But we do not think that the law necessarily bears that construction. There is no express prohibition against assisting such a person in the preparation of his ticket, nor against his obtaining a ticket outside the polling place for that purpose, nor against assisting to a booth or the polls one physically unable to go alone. Such a case is not within the mischief aimed at, and we hold that under this law such a voter is entitled to receive assistance in the preparation of his ticket, and to receive and have his ticket prepared outside the polling places. This, we think, is in accord with that maxim of interpretation that a thing which is within the spirit of a statute is within the statute, although not with the intention."

Notes

1. State vs. Boston, 59 Ohio St. 122; State vs. McMillan, 108 Mo. 153; Oughton vs. Black, 212 Pa. St. 1; Taylor vs. Bleakley, 55 Kan. 1; Atty. General vs. May, 99 Mich. 538; Detroit vs. Rush, 82 Mich. 532.

2. 208 Pa. St. 108.

3. 212 Pa. St. 1; Todd vs. Election Comm., 104 Mich. 481; but contra Eaton vs. Brown, 96 Cal. 365.

4. 164 Mass. 486.
5. Miner vs. Olii, 159 Mass. 487.
6. Chamberlain vs. Wood, 155 Dak. 216.
7. 88 Ky. 502. Note American and English Annotated Cases, Vol. IV, p. 146.
8. 82 Mich. 541.

Section 33. Effect of Irregularities in Preparing Official Ballot upon the Validity of Votes Cast

The general principle of law is that innocent voters should not ordinarily be deprived of their right to vote, through the mistakes or misconduct of the officials whose duty it is to prepare the official ballots.[1] This is true even although the officials may themselves be criminally liable for their actions in the matter.[2]

In Blackmer vs. Hildreth[3] the court said on this general question:

"This must be borne in mind in the construction of such statutes, and the presumption is that they are enacted to prevent fraud and to secure freedom of choice, and not by technical obstructions to make the right of voting insecure. The provisions above cited with reference to the preparation of the ballot are plainly limited and confined to that purpose. They are binding upon the officers for whose guidance and direction they are

needed. If it be seasonably objected to a nomination paper that it was not filed within the time required by section 145, or that the provisions of sections 141 and 142 have not been complied with, it is the duty of the proper board to inquire into and settle the question, and to sustain the objection if found to be true, and reject the paper. So far as respects their decision these provisions are mandatory. When the decision is made it is final, and a ballot made up in accordance therewith is not thereby made illegal. And in the same way the action of the town clerk, at least in the absence of fraud and corruption, as to the papers to which no objection is made, must be regarded as final so far as respects the ballot which he prepares.

"But with the preparation of the ballot, the influence of these provisions ends. If there be irregularities like those in this case they do not accompany the ballot and taint it in the hands of the voter. This view of the statute gives due weight and scope to the provisions in question, and preserves the sanctity of the right of suffrage and its free and honest exercise. To hold otherwise would be to lose sight of the purpose for which these provisions were made, namely, to provide the method and time for the preparation of the

ballot, and would subject our elections to intolerable and perplexing technicalities in no way material to the substantial merits of the controversy or to the freedom and result of the action of the voters. Its natural tendency would be to thwart rather than to secure a true expression of the popular will."

The improper insertion or omission of names of candidates will not invalidate the ballots cast.[4] The same rule applies in the case of the omission of a party emblem, or the insertion of a prohibited emblem.[5]

Irregularities in the indorsement of ballots by certain designated officials have also been held not to invalidate the ballots cast.[6]

In Dale vs. Irwin [9] it was held that where case where a county clerk, who was a candidate for re-election, fraudulently caused the names of certain persons to be illegally placed upon the ballots as candidates, ballots cast could not be counted in his favor.

Ballots will not be counted where the irregularities are such as by statute are declared to invalidate the ballot, or are such as serve as distinguishing marks.[8]

In Dale vs. Irwin [9] it was held that where the owner of the building where a polling place had been located refused to permit the building to be used for this purpose and the

election officials moved the polls to another building 50 or 100 feet away and the election was held there in plain sight of the advertised polling place, that the election was not invalidated.

Notes

1. Montgomery vs. Henry, 144 Ala. 629, 6 Ann. Cas. 965, 1 L. R. A. N. S. 656; Smith vs. Harris, 18 Colo. 274, 32 Pac. Rep. 616; State vs. Saxon, 30 Fla. 668, 12 So. Rep. 218, 18 L. R. A. 721, 32 Am. St. Rep. 46; see Territory vs. Kanealii, 17 Hawaii 243, 7 Ann. Cas. 837; Baker vs. Scott, 4 Idaho 596, 43 Pac. Rep. 76; Murphy vs. Battle, 155 Ill. 182, 40 N. E. Rep. 470; Schuler vs. Hogan, 168 Ill. 369, 48 N. E. Rep. 195; Perkins vs. Bertrand, 192 Ill. 58, 61 N. E. Rep. 405, 85 Am. St. Rep. 315; Rexroth vs. Schein, 206 Ill. 80, 69 N. E. Rep. 240. See also Hodge vs. Linn, 100 Ill. 397; Gill vs. Shurtlegg, 183 Ill. 440, 56 N. E. Rep. 174. Compare Harvey vs. Cook County, 221 Ill. 76, 77 N. E. Rep. 424; Jones vs. State, 153 Ind. 440, 55 N. E. Rep. 229, 74 Am. St. Rep. 305; Cook vs. Fisher, 100 Iowa 27, 69 N. W. Rep. 264; Ogg vs. Glover, 72 Kan. 247, 83 Pac. Rep. 1039; State vs. Norris, 37 Neb. 299, 55 N. W. Rep. 1086; Esquibel vs. Chaves, 12 N. Mex. 482, 78 Pac. Rep. 505; State vs. Millar (Okla. 1908), 96 Pac. Rep. 830; Kulp vs. Railey, 99 Tex. 310, 89 S. W. Rep. 957.

2. Jones vs. State, 153 Ind. 440, 55 N. E. Rep. 229.

3. 181 Mass. 29, 63 N. E. Rep. 14.

4. Peabody vs. Nurch et al., 75 Kan. 543; Rexroth vs. Schein, 206 Ill. 80, 69 N. E. Rep. 240; State vs. Franshan, 19 Mont. 273, 48 Pac. Rep. 1.

5. Jones vs. State, 153 Ind. 440, 55 N. E. Rep. 229.

6. Parvin vs. Winberg, 130 Ind. 561, 30 N. E. Rep. 790; Horning vs. Board of Canvassers, 119 Mich. 51, 77 N. W. Rep. 446.

7. 51 S. W. Rep. 428.

8. Cross vs. Keathly (Tenn.), 105 S. W. Rep. 854.

9. 78 Ill. 170.

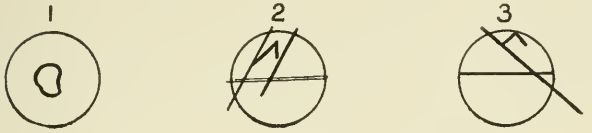
Section 34. Form of the Cross

All the Australian ballot laws provide that the voter shall express his choice by means of a cross made opposite the name of the candidate for whom he intends to vote.

The courts have always been very lenient in their rulings as to what will be considered as being the required cross. If, however, a mark bears no possible resemblance to a cross; or is evidently as a distinguishing mark,[1] the ballot cannot be counted.

In Rexroth vs. Schein[2] the court was called upon to pass upon the legal sufficiency of the

three following marks, which appeared within the circles of three different ballots:



The first ballot was rejected, but the second and third were counted, the court saying: "The marks were made with ink, and while it is somewhat blurred and cannot be said to be a cross, strictly speaking, still we think it shows an attempt on the part of the voter to make such a mark," and was, therefore, properly counted.

In Apple vs. Barcroft[3] the Supreme Court of Illinois again passed upon the sufficiency of various marks found on some of the ballots cast in an election, as follows:

"Ballot numbered 1, so counted for appellee, contains no cross in the appropriate place, opposite the name of appellee, or preceding the appellation or title of the party of which he was the candidate. There are two lines commencing in the circle, preceding said appellation or title, drawn with a lead pencil nearly perpendicularly through said

circle and through each of the squares opposite the names of the candidates. These lines were at some points coincident and at others separated. There was no cross, nor anything approaching one, in the circle, or in the square opposite appellee's name, as the statute required, to indicate an intention of the voter to vote for him or any one else. The statute must be substantially complied with. To permit the voter to substitute some other method of his own of marking his ballot, to express his choice, for the one provided, would practically nullify the statute. It would not only lead to uncertainty in ascertaining the voter's intention, but would destroy the secrecy of the ballot, by means of distinguishing marks, by which the ballot of each voter could be identified. There was in this instance no such compliance with the statute by the voter as contemplated by its provisions, and the county court erred in counting this ballot for appellee. Ballot numbered 2 shows a cross, thus 'X,' not in the square or appropriate place opposite the name of appellant, but to the right of appellant's name, between such name and the square opposite the name of appellee. While there was some plausibility in the contention of appellant that the way in which this bal-

lot was marked showed that it was the intention of the voter to vote for appellant, still, as was held in the case of Parker vs. Orr (decided at the present term of this court), 41 N. E. 1002, it cannot be held a sufficient compliance with the statute. It is clear from the statute and the form of ballots prescribed that the appropriate place for the cross is in the circle or square preceding the title or name, and not some blank space discovered by the voter at the right of such title or name. As to the ballot in question, as the cross is between the names of the appellant and appellee, being at the right of the former, and at the left of the latter, the only reason for supposing that the elector intended to vote for appellant, rather than for appellee, is that the cross is nearer appellant's than appellee's name. To hold such a ballot as one cast for either candidate would be mere guess work. Ballot numbered 3 shows mere pencil erasures of the name of appellant and all other names on the same ticket. No argument or authority is needed to show that the trial court ruled correctly in refusing to count this ballot for either party."

An unusually heavily marked cross will not invalidate the ballot.[4]

Notes

1. See Section 36.
2. 206 Ill. 80.
3. 158 Ill. 649, 41 N. E. 1116.
4. Rexroth vs. Shein, 206 Ill. 80 yo N. E. Rep. 240.

Section 35. Validity of Vote as Depending Upon Place of Mark for Candidate

While ballots are not necessarily to be disregarded because not marked in exact accordance with the directions of the statute,[1] still a ballot will not be counted for any candidate unless so marked as to clearly show for which candidate it was intended to be cast.[2]

In State ex rel. Crain vs. Acker[3] the case involved the right to an office for which the litigants were candidates. The respondent, Acker, had a majority of sixteen of the concededly valid ballots, but there were forty ballots marked in the following manner:

For
County Superintendent of
Schools.
Vote for One.
RUBY M. ACKER,
A Non-Partisan

Superintendency .....[ ]
Edward P. Crain,
E. P. CRAIN,
A Non-Partisan
Superintendency .....[ ]
.....[x]

The relator, Acker, claimed that these forty ballots should have been counted for him; the court, however, held that the ballots were properly rejected.

There are a number of other decisions holding that a cross so placed on the ballot should not be counted for any candidate.[4]

The law on this subject is thus summed up in Flanders vs. Roberts.[5] "The rule to be applied is this: If the intent of the voter can be fairly determined, effect shall be given to that intent and the vote counted in accordance therewith. This is the rule originally laid down in re Strong 20 Pick (Mass.) 484, and continued under the Australian ballot system in acts which are now R. L. c. 11, Sec. 238, providing that if the voter's choice cannot be determined, his ballot shall not be counted; and this has been recognized in this commonwealth in all the reports of committees of the legislature on which it has acted in deciding questions of this kind involved in the election of its members. It must be taken

to be established that where a cross is put in the square opposite the blank space left for the insertion of a name of a candidate for the voter, and nothing more appears, the ballot is not to be counted as a ballot for the candidate whose name is printed next above that space."

It has even been held that a cross thus placed is a "distinguishing mark" and will invalidate the entire ballot.[6]

It has been held that when the lines of the X cross in the square the fact that such lines extend beyond the square will not invalidate the vote.[7] Thus it was held in Illinois, in the case of Parker vs. Orr,[8] that the statutory provision that the voter shall prepare his ballot by marking in the appropriate margin or place a cross opposite the name of the candidate, for whom he desires to vote is merely directory, and does not render invalid ballots which show on their face that the voters attempted to make a cross in the proper place, but did not fully succeed in doing so.

In rendering this opinion the Court said:

"It has always been held in this state that if the intention of the voter can be fairly ascertained from his ballot, though not in strict conformity with the law, effect will be given to that intention. In other words, that the

voter shall not be disfranchised or deprived of his right to vote through mere inadvertence, mistake, or ignorance, if an honest intention can be ascertained from his ballot."

Notes

1. State ex rel Crain vs. Aeker, 142 Wis. 394; 125 N. W. 952.

2. Sweeney vs. Hjul, 23 Nev. 409, 48 Pac. Rep. 1036; State vs. Peter, 21 Wash. 243, 57 Pac. Rep. 814.

3. 142 Wis. 394, 123 N. W. 952.

4. Kerr vs. Flewelling, 235 Ill. 325, 88 N. E. 624; Patterson vs. People, 65 Ill. App. 651; O'Connell vs. Mathews, 177 Mass. 518, 59 N. E. Rep. 195; Carnile vs. Jones, 31 Mont. 590, 101 Pac. Rep. 153.

5. 182 Mass. 524, 65 N. E. Rep. 902.

6. Voorhees vs. Arnold, 1083 a 77, 78 N. W. Rep. 795.

7. Parker vs. Orr, 158 Ill. 609, 41 N. E. Rep. 1002. See also McKinnon vs. People, 110 Ill. 305; Berbrensmeyer vs. Krertz, 135 Ill. 591, 26 N. E. 704.

8. 158 Ill. 609, 41 N. E. Rep. 1002.

Section 36. Distinguishing Marks

The principal object of the Australian ballot system being to secure the secrecy of the ballot, it naturally follows that, as a general principle of law, any mark either upon the

face or the back of a ballot, by which the person voting it might be identified, will invalidate the ballot.

It is often a difficult question, however, to determine what is sufficient to constitute a distinguishing mark.

If a mark of any kind is accidentally made upon a ballot, this should not be considered as a distinguishing mark, and as invalidating the ballot.[1] Thus it has been said:[2]

"All voters are not alike skillful in marking. Some are not accustomed to using a pen or pencil, and may place some slight mark on the ballot inadvertently, or a cross first made may be clumsily retraced. It is evident that in such cases, and in others where the unauthorized mark is not of a character to be used readily for the purpose of identification, the ballots should be counted, but where the unauthorized marks are made deliberately, and may be used as a means of identifying the ballot, it should be rejected."

The same rule is generally applied when the accidental mark is found upon the back of the ballot. Thus in Rutledge vs. Crawford[3] it was held that: "The fact that on the back of a ballot, otherwise regular, is a faint type impression of the face of a similar ticket, caused by there having been too much

ink on the type, or that there is a small piece of red sealing wax, or a stain, as from a drop of oil, does not, in the absence of evidence of unlawful intent in causing the impression, make the ballot illegal, within the meaning of Pol. Code, Sections 1206, 1207, which provide that a ballot must be rejected if it bears on the outside any impression, device, color, or thing 'designed' to distinguish it from other legal ballots, or 'intended' to designate or impart knowledge of the person who voted it."

"If an elector use ink to scratch names from his ballot, and by that means the ballot becomes discolored, such discoloration is not a mark upon the ballot which will authorize the judges of election to refuse to count the vote, for it is not designated to distinguish it from other ballots, or to impart knowledge of the person who voted it."[4]

Among various ballots which have been declared void on account of a distinguishing mark, are the following:

"A ballot having, in addition to stamps in the squares opposite the names of candidates, a stamp in a square opposite to which there is no candidate, but merely a blank left for a certain office, or having more than one

stamp in the square at the head of a party's list.[5]

A ballot having a pencil mark across the name of a candidate violates such statute, as does one properly stamped, except that a stamp opposite the name of a candidate was erased so that a hole was made through the ticket.[6]

A ballot bearing within one of the large squares a distinct marking, as with a pencil, about one-fourth of an inch wide and five-sixteenths of an inch long, in addition to the voter's stamp.[7]

Ballots marked with a cross consisting of more than two intersecting straight lines.[8]

A ballot which has a cross under the heading of one ticket outside the square, and the square inclosed in a large circle.[9]

Perhaps the plainest case of all as to a distinguishing mark, is where a voter signs his ballot. Such ballots are always void.[10]

In Tebbe vs. Smith,[11] the writing of the letter "J" on the ballot was held to invalidate it.

Notes

1. People vs. Parkhurst, 53 N. Y. Supp. 598; McMahon vs. Polk, 105 D. 296.
2. Whittan vs. Zahorik, 91 Iowa 23.
3. 91 Cal. 526, 27 Pac. Rep. 779.

4. Wyman vs. Lemon, 51 Cal. 273.

5. Sego vs. Stoddard, 136 Ind. 297, 36 N. Y. 204.

6. Id.

7. Zeis vs. Passwater, 142 Ind. 375, 41 N. E. Rep. 796.

8. Whittan vs. Zahorik, 91 Iowa 23.

9. Ellis vs. Glaser, 102 Mich. 396, 61 N. W. Rep. 648.

10. Vallier vs. Brakke, 7 S. D. 343, 64 N. W. 180; Parker vs. Orr, 158 Ill. 609; Pennington vs. Hare, 60 Minn. 146.

11. 108 Cal. 101, 41 Pac. Rep. 454.

Section 37. Marking a Straight Ballot and a Split Ballot

Under the Massachusetts form of the Australian ballot there is no difference between the method to be observed in marking a straight ballot and a split ballot. In either case the voter must place his cross beside the name of each candidate for whom he desires to vote.

Where, however (as for example, in Illinois), the names of candidates are arranged in party columns, it becomes possible to vote a straight party ticket by placing a cross in the circle at the head of the column.

A "split" ticket may be voted in either of two ways. The simplest and safest way

is for the voter to disregard the circle and to vote for each candidate separately. He may, however (in most States), put his cross in the circle of one party, and place a cross opposite the name of such candidates of other parties as he may desire to vote for. A ballot so marked will be counted for all the candidates of the party in whose circle the cross has been placed, except those candidates who are candidates for positions, for which a candidate of some other party is marked. If more than one person is to be elected to a certain position a voter who desires to split his ticket must vote for all the candidates for the position for whom he desires his vote to be counted. For example, if ten are to be elected to the position of County Commissioner, and a voter makes a cross in the Democratic circle, and in front of the names of one Republican candidate for County Commissioner, this ballot cannot be counted for any of the Democratic candidates for County Commissioner.

Section 38. Number of Times Name of a Candidate May Appear on the Ballot

Under election laws which provide that the names of candidates for office shall be grouped in columns, by parties, the name of a

candidate may appear as many times on the ballot as a candidate for a particular office, as he has been nominated by different parties.[1]

In several States, however, where the names of the candidates are arranged in party columns, the statutes expressly prohibit the name of a candidate appearing more than once on the official ballot. Such statutes have been held to be constitutional.[2] Thus, in Todd vs. Election Commissioners,[3] the Court said:

"It is also insisted that the candidate has the constitutional right to have his name appear upon the ticket of every party which indorses him. It (the statute) gives every candidate the right to have his name appear upon the ticket once. Naturally, it belongs in the column of that party with which he is openly affiliated; but if he chooses to have his name attached to the ticket of some other party, and that party does not object, he possesses that right. But I know of no reason or authority for saying that any candidate possesses the constitutional and inalienable right to have his name appear more than once upon the official ballot containing the tickets of two or more political parties. The Australian ballot contemplates that his name

shall be there but once. It follows then that every voter has a reasonable opportunity to vote for him. This is the sole constitutional right guaranteed him. He has no occasion to find fault so long as he is permitted to have his name upon the ballot upon such ticket as he chooses, with the constitutional right following of an opportunity given to every voter to vote for him, which he can do by simply making two crosses instead of one."

Where the election laws of a State provide that the candidates shall be arranged alphabetically under the title of the office for which they are a candidate it is generally held that the name of a candidate cannot appear more than once on the ballot. In State vs. Allen[4] the court was called upon to construe the following provision of the election laws of the State of Nebraska:

"Every ballot shall contain the name of every candidate whose nomination for any office specified in the ballot has been certified or filed according to the provisions of this act, and no other names. The names of candidates for each office shall be arranged under the designation of the office in alphabetical order according to surnames, except that the names of electors of President and Vice-President of the United States presented in

one certificate of nomination shall be arranged in a separate group. Every ballot shall also contain the name of the party or principle which the candidate represents, as contained in the certificate of nomination," etc. Under this statute it was held that the name of such candidate could appear once only on the official and sample ballots, accompanied by such political or other designation as corresponds to his nomination papers on file with the proper officer.

Notes

1. Simpson vs. Osborn, 52 Kan. 328; Commonwealth vs. Richmond, 5 Pa. Dist. 647; Fisher vs. Dudley, 74 Md. 242.
2. State vs. Bode, 55 Ohio State 224; but contra Murphy vs. Curry, 137 Cal. 479.
3. 104 Mich. 474.
4. 43 Neb. 651.

Section 39. Writing in Additional Names on Ballot

Under the Australian Ballot System, every voter has at all times the right to write in additional names of persons for whom he desires to vote. This is true whether or not a line is left on the ballot, upon which to write such names.

This question was passed upon by the Court in the case of Sanner vs. Patton,[1] the decision in which case was, in part, as follows:

"This was a proceeding instituted by Shields H. Sanner in the County Court of Shelby County to contest an election for the office of Commissioner of Highways of the town of Penn held on the 3d day of April, 1894, wherein Robert A. Patton had been declared elected. The defendant, Robert A. Patton, put in an answer to the petition, and on the hearing of the pleadings, and evidence, the court entered a judgment dismissing the petition.

"The record in this case shows that Robert A. Patton, the appellee, was nominated for the office of a Commissioner of Highways and his name placed upon the official ballot; that Sanner's name was not printed or placed on the official ballot, and that no ballot containing his name was furnished the voters at said election. It is expressly stipulated in the record that Patton was the only persons nominated as candidate for such office; that Shields H. Sanner was not nominated for such office by any of the modes prescribed by statute; that only one ticket was prepared and printed by the Town Clerk, as follows:

O Republican

For Town Clerk

[ ] JOHN L. GREGORY

For Assessor

[ ] JAMES C. THOMPSON

For Collector

[ ] WELLS M. BECK

For Commissioner of Highways

[ ] R. A. PATTON

Justices of the Peace

[ ] E. B. CUTLER
[ ] IRA T. BAIRD

For Constables

[ ] D. R. CUTLER
[ ] E. T. ROBISON

Indorsement

"Official Ballot of Annual Town Meeting of Penn Township, Shelby County, Illinois, April 3d, 1894.

"R. BAND,
"Town Clerk."

"At the election 42 ballots were cast. Sixteen of the 42 contained a cross in the large circle on the ticket opposite the word 'Republican' and they were counted for Robert A. Patton. One ballot had no mark in the large

circle, but contained a cross in each of the blocks opposite all the names on the ticket, except the first one. It also appeared that 25 ballots were rejected by the judges of election, being in the same form as the 17 above referred to; that 23 had the name of S. H. Sanner written under the name of R. A. Patton, in blank space between said Patton's name and the words 'For Justice of the Peace,' and a block and X therein were placed at the left of Sanner's name. It was stipulated in the trial that the 25 ballots were rejected by the judges of election because the name of Sanner was written on the ballots for the office of Commissioner of Highways; the judges holding that a voter had no right to write Sanner's name on an official ticket, for the reason that he had not been nominated, and that by so doing the ticket was void, and should be rejected by the judges of election in canvassing the votes. . . .

"It is apparent from Section 1 of the act that all ballots to be used at the election are required to be printed and furnished at public expense, and the use of all other ballots is absolutely prohibited; and, if no section of the act permitted the voter to change the ballot by inserting the name of some person whose name did not appear on the ticket

so furnished, we would be inclined to hold that the voter would be compelled to vote the ticket as it was furnished to him, or be denied the privilege of voting for any person whatever. There are, however, other sections of the act, which, when considered in connection with Section 1, would seem to indicate that the Legislature never intended to restrict the voter to the persons whose names were printed on the official ballot. Section 21 of the act requires the officers upon whom the duty is imposed of providing polling places to provide a sufficient number of booths, and the booths shall be furnished with shelves, pens, penholders, ink, blotters, and pencils, as will enable the voter to prepare his ballot for voting. Each booth is required to be three feet square, and contain a shelf one foot wide, at a convenient height for writing. If the voter, when he receives a ballot and enters the booth, has no authority to write the name of a candidate on the ticket, and can do nothing but take a ballot and make a cross in the circle, or a cross opposite the names of such persons on the ticket as he may wish to vote for, no necessity exists for a shelf to write on, or for ink, pens, and blotter. If the voter is permitted to do nothing but make a cross on

the ticket, as indicated, he can do this with a pencil in a moment, and no necessity exists for the writing material required to be furnished. But, independent of this section, we think Section 23, which points out the mode or manner of voting after the voter receives the ballot, clearly confers upon the voter the power to insert in the ballot the name or names of such persons as he may desire to vote for for any office to be filled at the election, and vote for such persons. Upon examination of this section, it will be seen that, if the voter desires to cast his vote for all the candidates of one political party whose names appear on the ticket, he may do so by merely making an X in the circle printed on the ticket, opposite the name of the political party, and a vote of this character will be counted for all the candidates on that ticket. There is another mode. If the voter does not desire to vote for all the candidates whose names appear on the ticket of the political party to which he belongs, he may put a cross in the circle opposite the name of his political party and then make an X opposite the name of any candidate on any one of the other tickets for whom he may desire to vote, and the ballot will be counted for any candidate before whose name the X

thus appears; and, with this exception, it will be counted for those candidates appearing below the circle containing the X. There is yet another mode, which in the language of Section 23, is as follows: 'The voter shall prepare his ballot by marking in the appropriate margin or place an X opposite the name of the candidate of his choice for each office to be filled, or by writing in the name of the candidate of his choice in a blank space on said ticket, making an X opposite thereto.' Under this clause the voter may pay no attention whatever to the circle, but may place a cross opposite the name on the ballot of any candidate whose name may be on the ballot for whom he desires to vote, and the ballot shall be counted for such candidate, or he may write the name of a candidate in the ballot and place an X opposite the name, and the ballot shall be counted for such person.

"It is claimed that Section 14 prohibits the voter from writing on the ballot the name of a person who has not been nominated. That section, as has been seen, in substance, declares that the names of all persons to be voted for shall be printed on one ballot—all nominations of any political party being placed under the party appellation, as

designated in the certificates of nomination —and the ballot shall contain no other name. This section has reference to the duty of those intrusted with preparing the ballot to be placed in the hands of the judges of election; but after the ballot has been prepared, and placed in the hands of the judges of election, whether the voter may or may not add the name of a candidate to the ballot is a question upon which the section is silent. Some importance is sought to be attached to Section 26 of the act, which, in substance, provides: No ballot without the official indorsement shall be allowed to be deposited in the ballot box, and none but ballots provided in accordance with the provisions of this act shall be counted. As to this provision, it is sufficient to say that the addition of the name of one or more candidates to a ballot by the voter does not destroy the official indorsement on the ballot, nor does the change render the ballot one prepared contrary to the provisions of the act. On the other hand, the ballot, after the change, still retains the official indorsement, and is still a ballot prepared at public expense, as contemplated in the act. It is also said that ample provision has been made in the act, under which candidates may be nominated,

and thus be entitled to have their names placed on the ticket, and that it is the intention of the act that no vote should be cast for a person who was not nominated. If such was the intention, why did not the Legislature say so, and why did it say directly the contrary? What, it may be asked, is there so sacred in the nomination of a candidate for office by a political caucus that a voter should be compelled to vote for a nominee of the caucus, or else be deprived of the elective franchise? Under Section 1, Art. 7, of our constitution, every male citizen of the United States above the age of 21 years, who has resided in the State 1 year, in the county 90 days, and in the election district 30 days next preceding any election, is entitled to vote at such election. To exercise this right there is one exception, and but one, so far as we have been able to find; and that is found in Section 7 of the said article, which declares: 'The General Assembly shall pass laws excluding from the right of suffrage persons convicted of infamous crimes.' Adopting the well-known maxim or rule of construction that the expression of one thing is to be regarded as the exclusion of another, the Legislature does not possess the power to take away from a resident citizen the right

of suffrage unless he has been convicted of an infamous crime, nor can the Legislature do indirectly what they cannot do directly. And yet, if the construction contended for by appellee be the correct one, the voter is deprived of the constitutional right of suffrage; he is deprived of the right of exercising his own choice; and where this right is taken away there is nothing left worthy of the name of the right of suffrage—the boasted free ballot becomes a delusion. It will not be necessary to extend the discussion. We are satisfied that the Legislature, when they adopted that part of Section 23 which authorizes the voter to write the name of the candidate of his choice in a blank space on the ticket, making a cross opposite thereto, did so advisedly, and for the purpose of preserving the right of suffrage which belongs to the voter." . . .

"In conclusion, we are of the opinion that the ballots cast for S. H. Sanner were legal ballots, and should have been counted for him, and that the court erred in dimissing the petition. The judgment will be reversed and the cause remanded, with directions to enter a judgment in favor of petitioner."

Notes

1. 155 Ill. 553, 40 N. E. 290.

CHAPTER VIII

VOTING MACHINES

Section 40. In General

The latest step in ballot reform has been the introduction of voting machines in place of written ballot. These machines are intended to both register and count the votes. It is claimed for these machines that they lessen the chances of mistake in voting a ticket, and make mistakes in counting the ticket an impossibility.

"Three varieties of the voting machine have been legally sanctioned: (1) The Myers, in which the single ballot is placed in a frame having a push-knob for each candidate's name, the voter indicating his choice by pushing the knob opposite his candidate's name, when the machine indicates the vote on a dial at the back of the frame, and locks the knobs of all other candidates for the same office (before a second voter is ready, all knobs are unlocked); (2) the McTammany, which contains on its face a slot for each office, beneath which is a card bearing

the names of the candidates for the office seen through the slot, the voter's choice being indicated by turning a wheel till the name of his candidate appears, when he pushes a knob which punctures the tally-sheet; and (3) the Rhines, in which the names are arranged as in the Myers, by parties and offices. Slip names are inserted in the push buttons; and separate tally-sheets for each candidate, with vertical serial numbers, are placed beneath the face, the voter pushing a button which places a punch in such a position for each name that when the lid of the machine is closed the next number on each tally-sheet is punctured."[1]

Notes

1. Americana, Volume II.

Section 41. Constitutionality of Laws Providing for the Use of Voting Machines in Elections

The constitutionality of laws providing for the use of voting machines in elections has been repeatedly upheld.

The Massachusetts Supreme Court,[1] in passing upon the question, said as follows: "In construing a constitutional provision requiring that representatives 'shall be chosen by written votes' and an implied requirement for sorting and counting votes, the Court

said: 'It seems to us that the object and even the words of the Constitution in requiring "written votes" are satisfied when the voter makes a change in a material object, for instance, by causing a wheel to revolve a fixed distance, if the material object changed is so connected with or related to a written or printed name purporting to be the name of a candidate for office, that, by the understanding of all, the making of the change expresses a vote for the candidate whose name is thus connected with the device. So far as we have been considering the requirement of written votes alone, and have assumed that all other constitutional conditions are complied with. But it remains to consider whether the result is changed by the provisions as to sorting and counting votes where those provisions apply. These seem to us to raise less difficulty. The provisions do not express a constitutional end; they express merely assumptions that sorting and counting will be necessary if you have written votes, as they would have been necessary a hundred years ago. . . . If it be deemed technically necessary that the possibility at least of sorting and counting should remain, it does remain. Whether in the form of successive punches in a line upon paper

or in the marked revolutions of a wheel appropriated to a given candidate, material changes abide which signify by predetermined language the number of votes cast, exactly to the same extent that it would be signified by slips of paper bearing characters in printer's ink. The votes could be counted as cast, if it were necessary. They can be counted afterwards as well. The fact that the index of machinery has cut down the chance of personal error to a minimum surely is not an objection sanctioned by the Constitution.' "

In re Voting Machine[2] the Supreme Court of Rhode Island likewise upheld this method of voting:

"The primary meaning of 'ballot,' which signified a little ball, is not the one intended, but the broader meaning which has been substituted for the word by reason of the change in the mode of voting, from little balls to that of paper vote. The purpose of the Constitution is evidently to provide a record more permanent than that of counting hands and the like, by which the declared result may be verified. . . . We see no reason why a choice may not be indicated as well by a puncture of the paper as by a pencil mark. The language of the Constitution

seems, to be broad enough to cover the proposal. The purpose of the Constitution is subserved and the possibility of the change of method is anticipated and provided for. The essential thing to be secured is a record of the choice of the voters, and this, we understand, will be secured by the method proposed."

The Supreme Court of Illinois upheld such a law in the case of Lynch vs. Malley et al.[3]; citing with approval the Massachusetts case and Rhode Island case above referred to. Similar decisions have been rendered in a number of other cases.[4]

But in Helme vs. Board of Election Commissioners[5] a law providing for a mixed use of election machines and written ballots, in the same precincts, was held to be unconstitutional, as interfering with the secrecy of the ballot. And in Nichols vs. Minton[6] the Supreme Court of Massachusetts modified its earlier decision[7] by holding the adoption of voting machines to be unconstitutional where the voter was compelled to trust everything to the perfection of the machine. In the later opinion, the Court said:

"But the method in detail is entirely unlike the writing of a name of chosen candidates upon a piece of paper, and the deposit

of the paper in a box, to be afterwards taken out and counted. In the use of the machine the voter must trust everything to the perfection of the mechanism. He cannot see whether it is working properly or not. This chance of error, whether greater or less than the chance that a ballot deposited in a box will not be properly counted, is very different from it. It was not within the knowledge or contemplation of the framers of the Constitution. . . . To a majority of the Court, the adoption and use of a machine which employs none of these methods, and whose working and whose record of the result is invisible to the voter, seem so great a departure from the method referred to in the language of the Constitution as not to be included within its broadest meaning. Even if the principal objects to be accomplished by the constitutional requirement would be accomplished as well by the use of the machine, it seems too great a stretch of language to say that the use of it is the expression of a choice by a written vote."

Notes

1. Opinion of Justices, 178 Mass. 605.
2. 19 R. I. 729.
3. 215 Ill. 574; 2 Am. & Eng. Ann. Cases, 837.

4. McTammany Voting Machine, 23 R. I. 630; Trumbull vs. Board of Canvassers (Mich.), 103 N. W. 993; Detroit vs. Board of Inspectors, 102; 2, 1029; Ex parte Arnold, 128 Mo. 260; Elwell vs. Comstock, 9 Am. & Eng. Anno. Cases 270; United States Standard Voting Machine Co. vs. Hobson, 132 Iowa 38.
5. 140 Mich. 390.
6. 196 Mass. 410, 82 N. E. Rep. 50.
7. Opinions of Justices, 178 Mass. 605.

CHAPTER IX

COUNTING, RETURNING AND CANVASSING VOTES

Section 42. Counting the Votes

It is generally provided in election laws that the election officials shall begin to count the ballots immediately after the closing of the polls. This is for the purpose of minimizing the opportunities for fraudulently changing the ballots. The ballots should be counted at the time specified by statute;[1] but in the absence of fraud a postponement of the count will not be sufficient to vitiate the returns.[2] Nor will an election be necessarily rendered invalid by the election officials beginning to count the votes before the polls close, the statute providing that the votes should be counted after the closing of the polls.[3]

It is not necessary that the ballots should be counted at the polling place, unless there is a mandatory statute to this effect.[4] In Behrensmeyer vs. Kreitz[5] the judges took the ballots to a room upstairs from the polling

place, but it was held that in the absence of any proof of fraud such action did not vitiate either the election or the returns.

In cases where the statute requires that the ballots shall be publicly counted, it is unlawful to count them in a private room from which bystanders are excluded;[6] but the exclusion of bystanders in the absence of fraud, is not, by itself, a sufficient violation of the law to cause the rejection of the returns.[7]

Statutory provisions as to the manner of counting the votes are almost invariably construed as being directory instead of mandatory. A mere irregularity in the manner of counting the votes, where no fraud or mistake is charged, is not sufficient to sustain an election contest.[8] In, in re Zacharias,[9] however, it was held that as the statutes of the State provided that the ballots should be deliberately taken out of the ballot box, and each ballot counted as it was taken out from the ballot box, it was improper and irregular to empty the ballot box all at once and to separate the ballots into distinct lots.

The statutes generally provide that representatives of the different political parties shall be entitled to be present to watch the count; when such statutes are in force the election officials have no authority to exclude

the watchers properly appointed by the candidates, or the political committees of the different parties.[10]

Under no circumstances is it permissible for any candidates for office to assist in the counting of votes.[11] If a candidate does count or assist in counting the ballots, he loses the ballots thus counted by him.[12] Such an action, however, will not invalidate the election, or disqualify the candidate from holding the office, if he is elected without the aid of the votes counted by him.

The count of the ballots by persons other than the election officials, while always improper, will not affect the validity of the election, in the absence of fraud.[13]

Notes

1. Taft vs. Adams, 3 Gray (Mass.) 126.
2. Atty.-Gen. vs. Glaser, 102 Mich. 396, 61 N. W. 648; Atkinson vs. Lorbeer, 111 Cal. 419, 44 Pac. Rep. 162.
3. Ex parte Williams, 35 Tex. Cr. 75, 31 S. W. 653.
4. United States vs. Brewer, 139 U. S. 278; Daly vs. Petroff, 10 Phila. (Pa.) 389.
5. 136 Ill. 591, 26 N. E. Rep. 704.
6. United States vs. Badinelle, 37 Fed. Rep. 138; 15 Cyc. 374.
7. Atkinson vs. Lorbeer, 111 Cal. 419,

44 Pac. Rep. 162.

8. Hartzell vs. Smith, 18 Pa. Co. Ct. 551.

9. 3 Pa. Co. Ct. 656.

10. Commonwealth vs. Miller, 98 Ky. 446, 33 S. W. 401.

11. Greele vs. Pinney, 62 Conn. 478, 26 Atl. 1106.

12. Id.

13. Roberts vs. Clavert, 98 N. C. 580, 4 S. E. 127.

Section 43. Recount

After the ballots cast in any election have been once counted and the result declared, the election officials have no authority to recount such ballots, unless such right is expressly given by statute.[1] Furthermore, a recount cannot be ordered by any court, even when fraud or mistake are manifest, in the absence of statutory authority.[2]

In many States there are no statutory provisions authorizing such recounts of votes.

"A petition for a recount is governed by the rule which requires a plaintiff to state in his declaration a prima facie case for recovery, and a petition therefore praying for a recount of the ballots on the ground that a ballot was improperly rejected because of a difference of opinion among the election officers was quashed because it failed to inform

the court why the ballot was rejected, or upon what point the election officers differed.'' [3]

Notes

1. State vs. Donnewirth, 21 Ohio St. 216; People vs. Board of Town Canvassers, 19 N. Y. Supp. 206.

2. American and English Encyclopedia of Law, Vol. X, p. 751.

3. Keboch's Contested Election, 19 Pa. Co. Ct. Rep. 663, 6 Pa. Dist. Rep. 637.

Section 44. Returns

''The question as to what papers constitute the official returns is purely a matter of statutory regulation, but it may be said generally that the returns consist of the poll-book in which is entered the certificate of the officers conducting the election, together with a list of voters and one or more of the tally-sheets, all of which are to be carefully enveloped, sealed, and delivered to the officer or board designated by statute.[1] Only such papers as the statute requires may be regarded as election returns. If the officers go further and make statements on their own responsibility such statements should be disregarded.[2] The returns of election inspectors are ministerial and not judicial acts.[3] But they are quasi-records and must stand as evidence establishing the result of

the vote until they are impeached and overcome by affirmative proof that they do not speak the truth."[4][5]

The returns must always be authenticated by the judges, clerks or inspectors of election.

The method of forwarding returns are regulated by statute, but the statutory provisions on this point are always construed to be directory unless the statute expressly states a non-compliance with the methods will render the returns void.[6]

In the absence of fraud, irregularity in making returns is not sufficient to justify the rejection of the returns.[7]

Even a failure to make returns from certain election precincts will not render the election invalid, unless it can be shown that the votes not returned would have changed the result.[8]

The making of returns is a mere ministerial act, and election officials may be compelled by mandamus to make such returns.[9]

Notes

1. People vs. Ruyle, 91 Ill. 525; State v. Eastman, 46 Neb. 675, 65 N. W. 805; State v. McFadden, 46 Neb. 668, 65 N. W. 800.

Tally Sheets—In Missouri tally sheets are unknown to the law, and, although they are

convenient and perhaps necessary for the judges and clerks of election in casting up the votes polled for the several candidates they constitute no part of the official return. State v. Trigg, 72 Mo. 365; State v. Stuckey, 78 Mo. App. 533. And the same is true in North Dakota. State vs. McKenzie, 10 N. D. 132, 86 N. W. 231.

Names of Candidates—It has been held that the returns of precinct officers stating the number of votes received by the Democratic and Republican candidates respectively for a particular office are sufficient without stating the names of the candidates. Tunks vs. Vincent, 106 Ky. 829, S. W. 622, 21 Ky. L. Rep. 475.

Votes of Parties—The returns of election ought to show not only the votes for candidates, but also definitely the votes of parties. In re McKinley-Citizens Party, 6 Pa. Dist. 109.

2. Pacheo v. Beck, 52 Cal. 3; Ex parte Heath, 3 Hill (N. Y.) 42. On the trial of a mandamus proceeding to compel the county board of canvassers to reassemble and complete the canvass of an election, defendants offered in evidence a paper taken from the sealed envelope with the poll-book and signed by the judges of the election, stating that certain persons (naming them), offered to vote, they being men enlisted as soldiers in

Fort Sully, and entitled to vote, under the statutes of the United States, at the nearest voting precinct, the officers stated that they accepted their votes in a separate ballot-box, canvassed the same separately, put them back in the same box, and returned the same inclosed in the larger box under seal and lock. It was held that such paper was properly excluded as the judges of election had no right to make such statements, it not being one of their prescribed duties. Smith vs. Lawrence, 2 S. D. 185, 49 N. W. 7.

Superfluous Certificate—No other certificate of the officers of election than that provided by statute should be made and if made should be disregarded. State vs. Stuckey, 78 Mo. App. 533.

3. Their character is shown by the freedom with which they are scrutinized in proceedings by mandamus or information in the nature of a quo warranto. State vs. McFadden, 46 Neb. 668, 65 N. W. 800; Ex parte Heath, 3 Hill (N. Y.) 42.

4. Powell vs. Holman, 50 Ark. 85, 6 S. W. 505.

5. 15 Cyc., p. 376.

6. Fowler vs. State, 68 Tex., 303 S. W. Rep. 255.

7. Kellogg vs. Hickman, 12 Colo. 256, 21 Pac. Rep. 325; Mustard vs. Hoppess, 69 Ind. 324; Lehman vs. McBride, 18 Ohio St. 573.

8. Ex parte Heath, 3 Hill (N. Y.) 42.
9. Evos vs. State, 131 Ind. 560, 31 N. E. Rep. 357.

Section 45. Canvass

The duties of the board or officials who canvass the returns are of a ministerial character; the only power possessed by these officials which is of even a quasi-judicial character, is that of deciding as to whether the papers transmitted to them, and the signatures thereon, are genuine.

The scope of the power of canvassers of election is summarized as follows:

"Thus canvassers have no power to determine whether or not the votes cast at the election were legal or illegal,[1] or to inquire into the validity of the certificates of nomination of candidates.[2] Nor have they power to withhold their certificate of election, on the ground that fraud and bribery were used in obtaining votes for the successful candidate.[3] So the ballots of the electors as shown by the statements of the inspectors of election are the only evidence upon which the board of canvassers can act.[4] They have no authority to pass upon the eligibility of a candidate to office.[5] They have no authority to pass by the returns made to them by the judge of election and undertake to count

the ballots themselves.[6] So where a proposition on some question is submitted to the voters at a general election, in a State where such proposition in order to be carried must receive a majority of all the votes cast at such election for any candidate or question, the county canvassers have no authority to find and declare the total vote polled at the election, and a finding in that respect made by them will he rejected as surplusage.[7] It is the duty of the canvassers to receive and count all returns sent to them which are not obviously spurious, however false and fraudulent they may be in fact.[8] But where election returns are false on their face, showing that the election officers, in positive disregard of the mandatory election laws and of their oaths, received and counted many votes in reckless disregard of the terms of the statutes, they carry no favorable presumption whatsoever, and should be stricken from the election returns altogether.[9] And if a paper purporting to be a return is obviously a forgery the canvassers should disregard it.[10] But if it is doubtful they cannot judge of its validity and must include it in the count.[11] In short, their duties are confined to a pure, inflexible mathematical calculation, and they have no authority to

hear evidence upon any matters of discretion." [12] [13]

Notes

1. Franklin County vs. State, 24 Fla. 55, 3 So. 471, 12 Am. St. Rep. 183; State vs. Tanzey, 49 Ohio St. 656, 32 N. E. 750.

A county Board of Canvassers cannot reject any votes which may come to it duly certified on the ground that the statute which authorized such votes to be cast is unconstitutional. Matter of Woods, 5 Misc. (N. Y.) 575, 26 N. Y. Suppl. 169.

In South Carolina the State Board of Canvassers has the power to throw out ballots which do not meet all the requirements of the statute. Ex parte Riggs, 52 S. C. 298, 29 S. E. 645.

2. Piggott vs. Cascade County, 12 Mont. 537, 31 Pac. 536; Chamberlain vs. Hedger, 12 S. D. 135, 80 N. W. 178.

3. Com. v. Emminger, 74 Pa. St. 479.

4. They have no power to examine witnesse or receive other evidences to prove for whom a ballot was intended. People vs. Tisdale, 1 Dougl. (Mich.) 59; Kortz vs. Greene County, 12 Abb. N. Cas. (N. Y.) 84.

5. State vs. Finley, 74 Mo. App. 213; Matter of Atkinson, 28 Misc. (N. Y.) 694, 59 N. Y. Suppl. 792 (affirmed without opinion in 45 N. Y. App. Div. 628, 61 N. Y. Suppl. 1131).

Where a candidate has been nominated by more than one party the canvassers should reckon the total number of votes cast for him and not the number cast for him by each party. People vs. Erie County, 79 N. Y. App. Div. 514, 80 N. Y. Suppl. 25.

6. Holt vs. People, 102 Ill. App. 276.

7. State vs. Clark, 59 Neb. 702, 82 N. W. 8.

8. Missouri, State vs. Steers, 44 Mo. 223; Wisconsin, State vs. Board of State Canvassers, 36 Wis. 498.

9. Matter of Barber, 10 Phila. (Pa.) 579 (affirmed in 32 Leg. Int. 229).

10. In Re Orphans' Ct., 1 Brewst. (Pa.) 67, 5 Phila. (Pa.) 102; Lawrence vs. Knight, 4 Phila. (Pa.) 355.

11. In re Orphan's Ct., 1 Brewst. (Pa.) 67, 5 Phila. (Pa.) 102; Lawrence vs. Knight, 4 Phila. (Pa.) 355.

12. Clark vs. Hampden County, 126 Mass. 282; Luce vs. Mayhew, 13 Gray (Mass.) 83; In re Strong, 20 Pick. (Mass.) 484.

13. 15 Cyc., pp. 381-382.

CHAPTER X

ELECTION CONTESTS

Section 46. Nature of Proceedings to Contest Election

"As the election officers perform for the most part ministerial functions only, their returns, and the certificates of election which are issued upon them, are not conclusive in favor of the officers who would thereby appear to be chosen, but the final decision must rest with the courts. This is the general rule, and the exceptions are of those cases where the law under which the canvass is made declares the decision conclusive, or where a special statutory board is established with powers of final decision. Whatever may be the office, an election to it is only made by the candidate receiving the requisite majority or plurality of the legal votes cast; and whoever, without such election, intrudes into an office, whether with or without the formal evidences of title, may be ousted on the proper judicial inquiry." [1]

A proceeding to contest an election is

strictly statutory and is neither an action at law or a suit in equity,[2] although the character of the proceedings are in the nature of chancery suits.

The judicial character of a proceeding to contest an election was discussed by the Supreme Court of Illinois in the case of Quartier vs. Dowiat.[3]

This case was a proceeding instituted by Dowiat in the Circuit Court of Vermilion county to contest the election of Quartier to the office of president of the board of trustees of the village of Westville. A petition was filed with the clerk of the said Circuit Court which, after alleging many grounds why the appellant should be declared not duly elected and why the appellee should be declared elected, contained the following prayer: "Your petitioner further represents that on a count of the ballots cast by the electors your petitioner would have a clear majority, and he asks that such relief be granted as is provided by the statute in such cases made and provided, and for such other relief as equity, justice and the good conscience of this court will grant." The petition concluded as follows: "Your petitioner further asks that upon a recount of said ballots, as provided by law, he be declared duly elected

president of the village of Westville, and the declaration of the said judges that the said Eugene Quartier has been elected be annulled and canceled." A regular form of chancery summons was issued, which ordered the appellant to "answer unto Peter Dowiat in his certain bill of complaint, being a petition to contest election, filed in said court on the chancery side thereof," and was served as a chancery summons. The appellant appeared and interposed a special demurrer on the ground that the contest of an election was a statutory proceeding, and that a court of chancery had no jurisdiction to hear and determine an election contest. Thereupon appellee "moved the court to direct the clerk thereof to place the cause upon the common-law docket of this court at the present term thereof." The demurrer and the motion, called in the record a "cross-motion," were argued by the respective counsel together, and the court granted the motion as a cross motion, but made no formal order as to the disposition of the demurrer and the cause was thereupon placed upon the common-law docket. When the cause had been duly entered on the common-law docket, the appellant presented a plea in abatement, in which he recited all of the pro-

ceedings in the cause up to that time, and urged that the court had no jurisdiction of his person, for the reason that he had not been served with process, as required in common-law actions. A general demurrer was sustained to this plea, and, the appellant electing to stand by this plea, the court heard the cause on the merits, and entered judgment in accordance with the prayer of the petition. There was an appeal from such judgment.

In the course of its decision the court said:

"The court did not err in transferring the cause from the chancery to the common-law docket. This is a purely statutory proceeding, and is not regarded as a cause at law or in equity. Douglas v. Hutchinson, 183 Ill. 323, 55 N. E. 628. In Reed v. Boyd, 84 Ill. 66, which was a suit to establish a mechanic's lien under a statutory proceeding, the statute requiring such suit to be entered upon the common-law docket, we said (page 71): 'Nor can the fact that the statute requires it to be placed on the common-law docket change the nature of a cause. It is immaterial whether it is on one docket or another. Its position on the docket cannot change its nature or its inherent qualities.'

"The demurrer to the plea in abatement

was properly sustained. Proceedings of this character are in the nature of chancery suits, and the rules of chancery practice apply. Weinberg v. Noonan, 193 Ill. 165, 61 N. E. 1022; Hurd's Rev. St. 1903, c. 46, p. 116, entitled 'Elections.' Section 119 of the election act provides the final order in a contested election case shall be a judgment declaring who is elected; not a decree in which recitals of fact could be incorporated. In case of appeal or writ of error to reverse the same, the burden of preserving the evidence to sustain an attack on the judgment devolves on the party who questions the correctness of the action of the court.

"The summons recited that the cause was on the chancery side of the court. This statement was not inaccurate, as a proceeding of this character is governed by the chancery practice. Reed v. Boyd, supra."

Where a mode of contesting an election has been provided, this excludes all other methods of contest.[4]

Where the statutes provide no method of contesting an election an action of quo warranto[5] generally is the proper method of trying the question as to who is entitled to the office. Equity courts in some instances, where there was no common law method of

trying an election contest, have taken jurisdiction under the equitable maxim that "equity will not suffer a right to be without a remedy;"[6] but some cases hold that where the statutes fail to provide the manner in which an election contest shall be conducted, that no such contest can be made.[7]

In State vs. Dubuclet[8] it was held that:

"No statute having been enacted prescribing the manner of reviewing the action of the State returning board, their decision is not subject to revision by the courts, notwithstanding Const. art. 10, providing that 'all courts shall be open, and every person, for injury done him in his lands, goods, person or reputation, shall have adequate remedy by due process of law, and justice administered without denial or unreasonable delay.' "

In such a case the result certified by those holding the election is final and conclusive.[9]

As an illustration of the general character of State statutes regulating election contests, the provisions of the statute of Illinois on this subject are here inserted:

"*When Legislature to Hear.* § 94. The Legislature, in joint meeting, shall hear and determine cases of contested elections of governor and lieutenant-governor, secretary of

state, auditor of public accounts, treasurer, superintendent of public instruction, and attorney general. The meeting of the two houses, to decide upon such elections, shall be held in the hall of the house of representatives, and the speaker of the house shall preside.

"*Senators and Representatives.* § 95. The senate and house of representatives shall severally hear and determine contests of the election of their respective members.

"*By Circuit Court.* § 96. The Circuit Court shall hear and determine contests of the election of judges of the Supreme Court, clerks of the Supreme Court, judges of the Circuit Court, judges of the Superior Court of Cook county, and members of the State Board of Equalization, but no judge of the Circuit Court shall sit upon the hearing of any case in which he is a party.

"*By Circuit Courts, and in Cook County, also by the Superior Court.* § 97. The Circuit Courts in the respective counties, and in Cook county the Superior Court also may have (hear) and determine contests of the election of judges of the County Court, mayors of cities, presidents of county boards, presidents of villages, in reference to the removal of county seats and in reference to

any other subject which may be submitted to the vote of the people of the county, and concurrrent jurisdiction with the County Court in all cases mentioned in section ninety-eight (98).

"*By County Court.* § 98. The County Court shall hear and determine contests of election of all other county, township and precinct officers and all other officers for the contesting of whose election no provision is made.

"*Election of State Officers—Petition of Contestant.* § 99. When any elector shall desire to contest the election of governor, lieutenant-governor, secretary of state, auditor of public accounts, treasurer, superintendent of public instruction, or attorney-general, he shall, within ten days after the result of the election shall have been determined, present a petition to the General Assembly, setting forth the points on which he will contest such election, and praying for leave to produce his proof.

"*Joint Committee to Take Testimony.* § 100. The General Assembly shall appoint a joint committee to take the testimony on the part of the petitioner, and the person whose place is contested.

"*Powers of Joint Committee.* § 101. The

committee so appointed shall have power to send for witnesses, and compel the attendance of witnesses and the production of papers, issue commissions under the hand of its chairman, to any officer authorized to take depositions in other cases to take the deposition of witnesses upon the points set forth in the petition, at such time and place as the commission shall direct.

"*Notice.* § 102. Reasonable notice shall be given by the party in whose favor the deposition is to be taken to the opposite party of the time and place of taking the same.

"*Testimony.* § 103. No testimony shall be taken except upon the points set forth in the petition.

"*Report of Committee — Hearing — Decision.* § 104. The committee shall report the facts to the house and a day shall be fixed by a joint resolution for the meeting of the two houses to decide upon the same, in which decision the yeas and nays shall be taken and entered upon the journal.

"*Who May Contest Senator or Representative.* § 105. The election of any member declared duly elected to a seat in the senate or house of representatives of the General Assembly may be contested by any qualified

voter of the county or district to be represented by such senator or representative.

"*Notice of Contest.* § 106. The contestant shall, within thirty days after the result of the election shall have been determined, serve on the person whose election he will contest, a notice of his intention to contest such election, expressing the points on which the same will be contested; and shall, also, on or before the next session of the General Assembly, deliver a copy of such notice to the secretary of state. In case the person whose election is contested is absent, or cannot be found, service may be had by leaving a copy of such notice at his usual place of residence.

"*Testimony—How Taken.* § 107. Whenever a notice shall have been given of intention to contest an election, as provided in the preceding section, either party may proceed to take testimony of any witness before any judge, justice of the peace, clerk of a court, master in chancery or notary public, on giving to the adverse party or his attorney, ten days' notice of the time and place of taking the same, and one day in addition thereto (Sunday inclusive) for every fifty miles' travel from the place of residence of such party to the place where such deposition is

to be taken, five days' notice shall be sufficient.

"*Power of Officer Taking Testimony.* § 108. The officer before whom depositions are taken shall have power to compel the production of papers and the attendance of witnesses; and the same proceedings may be had to compel the attendance of witnesses as are provided in the cases of taking depositions to be used in courts of law and equity.

"*Depositions, etc., to Be Sent to Secretary of State.* § 109. A copy of the notice to take depositions, with proof of the service thereof, with the deposition, shall be sealed up and transmitted, by mail or otherwise, to the secretary of state with an indorsement thereon showing the names of the contesting parties, the office contested and the nature of the papers.

"*Delivery of Notice of Contest, etc.—Duty of Presiding Officer.* § 110. The secretary of state shall deliver the copy of the notice deposited with him by the contestant, and the depositions unopened, to the presiding officer of the branch of the General Assembly to which the contest relates, on or before the second day of its session next after the receipt of the same; and the presiding officer

shall immediately give notice to his house that such papers are in his possession.

"*Rights of Either House Saved.* § 111. Nothing herein contained shall be construed to abridge the right of either branch of the General Assembly to grant commissions to take depositions, or to send for and examine any witnesses it may desire to hear on such trial.

"*Who May Contest Election of Other Officers.* § 112. The election of any person declared elected to any office other than governor, lieutenant-governor, secretary of state, auditor of public accounts, treasurer, superintendent of public instruction, attorney-general, senator or representative, may be contested by any elector of the State, judicial division, district, county, town or precinct in and for which the person is declared elected.

"*Contestant to File Statement, etc.* § 113. The person desiring to contest such election shall, within thirty days after the person whose election is contested is declared elected, file with the clerk of the proper court a statement, in writing, setting forth the points on which he will contest the election, which statement shall be verified by affidavit in the same manner as bills in chancery may be verified.

"*Summons.* § 114. Upon the filing of such statement, summons shall issue against the person whose office is contested, and he may be served with process, or notified to appear, in the same manner as is provided in cases in chancery.

"*Evidence.* § 115. Evidence may be taken in the same manner and upon like notice as in cases of chancery.

"*Trial.* § 116. The case shall be tried in like manner as cases in chancery, and may be heard and determined by the court in term time or by the judge in vacation at any time not less than ten (10) days after service of process, or at any time after the defendant is required by notification to appear, and shall have preference in the order of hearing to all other cases. The court in term time or the judge in vacation may make and enforce all necessary orders for the preservation and production of the ballots, poll books, tally papers, returns, registers and other papers or evidence that may bear upon the contest.

"*Other Elections Contested.* § 117. Any five electors of the county may contest an election upon any subject which may by law be submitted to a vote of the people of the county, upon filing in the Circuit Court,

within thirty days after the result of the election shall have been determined, a written statement in like form as in other cases of contested elections in the Circuit Court. The county shall be made defendant, and process shall be served as in suits against the county; and like proceedings shall be had as in other cases of contested elections before such court.

"*When Elector May Defend for County.* § 118. In case the county board shall fail or refuse properly to defend such contest, the court shall allow any one or more electors of the county to appear and defend, in which case the electors so defending shall be liable for the costs in case the judgment of the court shall be in favor of the contestant.

"*Judgment.* § 119. The judgment of the court in cases of contested election, shall confirm or annul the election according to the right of the matter; or, in case the contest is in relation to the election of some person to an office, shall declare as elected the person who shall appear to be duly elected.

"*Tie.* § 120. If it appears that two or more persons have, or would have had, if the legal ballots cast or intended to be cast for them had been counted, the highest and an equal number of votes for the same office,

the persons receiving such votes shall decide by lot, in such manner as the court shall direct, which of them shall be declared duly elected; and the judgment shall be entered accordingly.

"*Certified Copy of Judgment.* § 121. A certified copy of the judgment of the court shall have the same effect as to the result of the election as if it had been so declared by the canvassers.

"*When Election Adjudged Void.* § 122. When the person whose election is contested is found to have received the highest number of legal votes, but the election is declared null by reason of legal disqualification on his part, or for other causes, the person receiving the next highest number of votes shall not be declared elected, but the election shall be declared void.

"*Appeal.* § 123. In all cases of contested elections in the Circuit Courts or County Courts, appeals may be taken to the Supreme Court in the same manner, and upon like conditions, as is provided by law for taking appeals in cases in chancery from the Circuit Courts."

"All provisions of the election law are mandatory, if enforcement is sought before election in a direct proceeding for that pur-

pose; but after election all should be held directory only in support of the result, unless of a character to effect an obstruction to the free and intelligent casting of the vote or to the ascertainment of the result, or unless the provisions affect an essential element of the election, or unless it is expressly declared by the statute that the particular act is essential to the validity of an election, or that its omission shall render it void. Parvin v. Wimberg, 130 Ind. 561, 30 N. E. 790, and 15 L. R. A. 775; Boyd v. Mills, 53 Kan. 594, 608, 37 Pac. 16, and 25 L. R. A. 486; Miller v. Pennoyer, 23 Or. 364, 31 Pac. 830; Stackpole v. Hallahan, 16 Mont. 40, 40 Pac. 80, and 28 L. R. A. 502; Blankinship v. Israel, 132 Ill. 514, 24 N. E. 615; Adsit v. Osmun, 84 Mich. 420, 48 N. W. 31, and 11 L. R. A. 534; McCrary, Elect. §§ 27-29; Endl. Interp. St. § 433. In the 16 Mont., 40 Pac., case, it was held that the statute prescribing certain facts to be stated in the certificate of nomination is not to be held mandatory in a case where the nomination has been duly made, the certificate filed, the name placed upon the ballot, the candidate voted for and elected by a plurality of all the legal votes cast, and when the effect of giving a mandatory construction to such provision would

be to disfranchise a plurality of the voters of the district. A statute providing that to entitle a political party to make nomination by a convention, it must have polled at the next preceding election 2 per cent of the vote of the county, is directory and not mandatory, after the election. Schuler v. Hogan, 168 Ill. 369, 48 N. E. 195. If one of the judges of election proceeds throughout his duties without taking the oath prescribed by law, or if one of the superintendents of election, after the polls are closed, but before the votes are counted, leaves the precinct and the other two count the votes and sign the certificate, the returns thus certified should not be excluded from the consolidated vote of the county because not signed by all three of the superintendents as provided by law, nor should they be excluded because one of the superintendents left before the count. Tanner v. Deen (Ga.) 33 S. E. 832. The statute of Pennsylvania provides that the name of any candidate shall not appear more than once upon the ballot. Gunster was severally nominated by the Democratic and Republican parties for the office of judge, and his name placed by the supervisors of election on both tickets upon the official ballot for that office; and it was held that 'after the

qualified electors had declared their choice by the use of the only ballots they could have used,' the election of Gunster was not thereby invalidated. Com. v. McCormick, 8 Pa. Dist. R. 117. It was held in Boyd v. Mills, 53 Kan. 594, 37 Pac. 16 and 25 L. R. A. 486, that the mistaken use of colored sample ballots by all the voters of a precinct did not vitiate the election." [10]

Notes

1. Cooley's Constitutional Limitations, Chapter XVII.

2. Devons et al. vs. Gallatin County et al., 244 Ill. 40; Moore vs. Mayfield 47 Ill. 187; People vs. Smith, 51 Ill. 323, 55 N. E. M.; Douglas vs. Hutchinson, 183 Ill. 323, 55 N. E. 628; Brueggeman vs. Young, 208 Ill. 181, 70 N. E. 292; Williamson vs. Lowe, 527 Ill. 235.

3. 219 Ill. 326, 76 N. E. Rep. 371.

4. Stine vs. Berry, 27 S. W. Rep. 809, 16 Ky. Law Rep. 279.

5. See Section 47.

6. "Courts of Equity had taken jurisdiction under their general powers for the sole reason that there was an absence of necessary legislation for a contest by any other means, but when the Legislature provided a method of contesting such an election there ceased to be any ground for interference by a Court of Equity under its general

powers, and the jurisdiction has not since been exercised." Devons et al. vs. Gallatin County et al., 244 Ill. 40; 18 Am. & Eng. Ann. Cases 422.

7. Clarke vs. Rogers, 81 Ky. 43.

8. 27 La. Ann. 698.

9. Clarke vs. Rogers, 81 Ky. 43; Savage vs. Wolfe, 68 Ala. 569.

10. Jones vs. State, 153 Ind. 440, 55 N. E. 229.

Section 47. Quo Warranto.

The general scope of the action of quo warranto, which can be brought to test the right of an individual to hold a public office, or of a corporation to exercise public or quasi public functions, is broad enough so that in many States it is available to test the legality of an official's election. The right to use this writ in election contests, as well as the scope of its application, if it can be used, depends very largely upon the statutes of the several States, and on this point, as on many others in election laws, the statute of the particular States must be consulted. Under the most favorable conditions there are disadvantages and limitations in the use of this writ; in particular the action can only be brought against a person already in office.[1] It can never, therefore, be used to

determine an election contest in time, so that the legally elected candidate can enter into the possession of the office at the beginning of the term. There is considerable conflict among the decisions on the question by whom may this action be brought. Originally, in England, the law was very plain that this action could be brought only by the government.[2] During the Stuart period in English history this writ was one of the most effective weapons of despotism, being used to take away their charters from nearly all the English cities and from some of the American colonies.

By statute of 9 Anne it was provided that an information in the nature of quo warranto might be brought, with leave of the court, at the relation of any person desiring to prosecute the same against any person usurping, intruding into, or unlawfully holding any franchise or office in any city, borough, or incorporated town. The operation of this statute, however, is confined to cases where the public at large is not interested.[3]

In some States of this country a private person is permitted to bring quo warranto proceedings by virtue of this statute of 9 Anne;[4] while in other States statutes have been passed to this effect. It has been very

generally held that under these State statutes this action of quo warranto can only be brought by a private person in cases where he has a special interest in the office.[5]

"Taxpayers of the district affected by the office have been held to have such an interest.[6] It has also been held that a citizen, resident and taxpayer, who is the father of pupils in the public schools of a city, may maintain an action to oust the members of the board of school directors.[7] But a defeated candidate has been held not to have such an interest in the office as justifies him in attempting to oust the incumbent on the ground of ineligibility.[8] Likewise, a police justice whose fees have been diminished by prosecutions for violations of municipal ordinances before a municipal judge, has not such an interest in the latter's office as warrants him in maintaining an information."[9] [10]

Under some State statutes, not even a candidate for an office can bring quo warranto proceedings to test the title of his opponents until he has first asked the proper public prosecuting officer to bring such suit, and has met with a refusal.[11]

The granting or refusal of leave to file an information in the nature of quo warranto, at the instance of a private person to test

the right to a public office, has been held to rest in the sound discretion of the court to which application is made.[12]

The weight of authority, especially among recent cases, is to the effect that where there is no State statute on the subject a private person can not bring quo warranto proceedings against any public official. On this point the Supreme Court of Idaho said in Toncray vs. Budge:[13]

"To allow any and every citizen to commence an action against any public official to oust him from office at any time he may see fit, whether for private and personal revenge or the public weal, would be most disastrous, dangerous, and prejudicial to the public service. In some communities, and under certain conditions, they might keep a public officer engaged most of the time defending his right to the office instead of discharging the public business. This remedy was created for the benefit and protection of the public in its governmental and sovereign capacity, and for the benefit of the community at large, rather than for the gratification, satisfaction, or protection of any particular individual other than one himself entitled to the office. The law-making power, in recognizing the right and prescrib-

ing the remedy to inquire into the conditions and circumstances under which one claims to hold an office, had the clear and unquestionable authority to also designate the party or parties who might invoke this remedy, and the conditions under which it might be applied." [13]

All quo warranto proceedings relative to the title of the United States officials must be brought to the Federal Courts.[14]

Notes

1. Scott vs. State, 151 Ind. 556, 52 N. E. Rep. 163.

2. Atty.-Gen. vs. Sullivan, 163 Mass. 446, 40 N. E. Rep. 843; State vs. Ashley, 1 Ark. 279; State vs. Elliott, 13 Utah. 200, 44 Pac. Rep. 248; State vs. Dahl, 69 Minn. 109, 71 N. W. Rep. 910.

3. Commonwealth vs. Lexington etc. Turnpike Road Co., 6 B. Mon. (Ky.) 397.

4. Id.

5. State vs. Stein, 13 Neb. 529, 14 N. W. Rep. 481; State vs. Boal, 46 Mo. 528; Barnum vs. Gilman, 27 Minn. 466, 8 N. W. Rep. 375; Painter vs. United States, 6 Ind. Terr. 621, 98 S. W. Rep. 352.

6. State vs. Samuelson, 131 Wis. 499, 111 N. W. 712. See also McWilliams vs. Jacobs, 128 Ga. 375, 57 S. E. 509.

7. State vs. Lindemann, 132 Wis. 47, 111 N. W. 214.

8. State vs. Bell, 169 Ind. 61, 82 N. E. 69, 13 L. R. A. N. S. 10-13, 124 Am. St. Rep. 203; Hudson vs. Conklin, 77 Kan. 764, 93 Pac. 585. See also State vs. Johnson, 28 Ohio Cir. Ct. 793.

9. Baughman vs. Nation, 76 Kan. 668, 92 Pac. 548.

10. 13 Am. & Eng. Annotated Cases, 1064 Note.

11. Boyd vs. Nebraska, 143 U. S. 135; State vs. Frazier, 28 Neb. 438, 44 N. W. Rep. 471.

12. Rex. vs. Trenever, 2 B. & Ald. 479; Commonwealth vs. McCarter, 98 Pa. St. 607.

13. 14 Idaho 621, 95 Pac. Rep. 26.

14. Wallace vs. Anderson, 5 Wheaton 291; State vs. Bower, 8 S. Car. 400.

Section 48. Mandamus

Mandamus is an important auxiliary proceeding in election contests; but is seldom available as a method by which the main issue in an election contest can be tried. As in all other cases mandamus can be used in election contests only for the purpose of compelling the performance of a mere ministerial act.

Where there can be no dispute as to the plaintiff's right to the office sought, man-

damus is the proper remedy. In Lewis vs. Whittle[1] the court said:

"Wherever there is a right to execute an office, perform a service, or exercise a franchise, more especially if it be a matter of public concern, and a person is dispossessed of such right and has no other specific adequate remedy, then the court ought to assist by mandamus upon reasons of justice, as expressed by the writ, and upon reasons of public policy, to preserve the peace, good order, and good government. It ought to be used on all occasions when the law has established no specific remedy. Whatever may be the rule elsewhere, it may be safely laid down as the doctrine of this court that mandamus is the true specific remedy for a wrongful deprivation of an office. What other specific adequate remedy have these petitioners, if they are clearly entitled to this office? If, as suggested, quo warranto should be adopted, and the petitioners should succeed there, they would not thereby be put in possession of what they seek, but might still be put to the necessity of mandamus for relief. They might succeed by quo warranto in removing their adversaries from the office, and yet need the mandamus to put them in possession. No proceeding that will give them less than

they ask can be said to afford them a specific and adequate remedy, if they are entitled to what they seek. Under the quo warranto information, judgment might remove the occupants, but would not install the claimants. They might still find it necessary to ask other process against some other person or office who might deem it his or their duty to keep them out."

Mandamus is therefore the proper remedy to restore a civil service appointee who has been improperly removed;[2] but can never be used to try a disputed title to office. In Pratt vs. Board of Police[3] the court said:

"It is also insisted for respondent that the appellant has mistaken his remedy, and that mandamus will not lie to restore him to office, because, since his removal, another person has had charge thereof. Mandamus is an extraordinary remedy, and the law is well settled that it will not lie to try a disputed title to an office, or to compel the admission of a claimant to an office the title to which is in dispute, and of which he has never discharged the duties or had the possession. Where a person, however, has been in the actual and lawful possession of an office, received and enjoyed the emoluments thereof, is entitled to the office de jure, and was

unlawfully removed therefrom, a different rule appears to prevail. In such case mandamus is an appropriate remedy to restore the de jure officer to his office, and it is not necessary to resort to quo warranto, even though the office be in possession of another."

The cases where the writ of mandamus will and will not lie in election contests have been summarized as follows:

"Mandamus will lie to compel the designation of the newspapers in which the list of registration and polling places is to be published,[4] to compel statement of the result of a primary election,[5] to compel the proper officers to receive and file a certificate of nominations,[6] to compel the officer charged with that duty to order an election,[7] to compel the placing upon the official ballot the name of a nominee,[8] to compel the appointment of legally selected judges of election,[9] to compel registrars of votes not to count an improperly marked ballot,[10] to compel a canvassing board to canvass the returns and issue certificates in accordance with the result,[11] and to compel a recount;[12] but the writ will not issue to compel election officers to do an impossible or an unnecessary thing,[13] to compel registrars of election to erase from the registration books the names of persons illegally reg-

istered where the statutes do not confer[14] or where the persons alleged to be illegally registered have not been brought into court or served with notice,[15] or to control the action of a canvassing board in recounting the votes.[16] An election contest cannot be determined in mandamus proceedings.[17] Mandamus proceedings to compel a mayor and council to canvass the returns of a municipal election may be instituted by a candidate claiming election[18] or by any citizen.[19] In Massachusetts a voter and taxpayer of a town may institute mandamus proceedings to compel the registrars of voters not to count an improperly marked ballot cast at a local option election.[20] Two candidates on the same ticket claiming election may join in a petition for mandamus to compel a canvass of the returns and issuance of certificates of election.[21] Mandamus proceedings to compel the performance of a duty incumbent upon a board of officers should be brought against the board as such and not against the members as individuals.[22] The mayor of a town who is the presiding officer of the council is a proper party to mandamus proceedings to compel the council to canvass the returns of a municipal election.[23] The petition for mandamus must designate the duty

sought to be enforced[24] and state facts sufficient to warrant its enforcement.[25] In Washington, where mandamus issues to compel a town council to canvass the returns of an election, service of the writ on a majority of the council is sufficient.[26] Where mandamus is issued to compel a canvassing board to canvass the returns of an election costs may be awarded against the board.[27] The fact that election officers have performed some of the acts commanded by mandamus does not preclude their appealing from the order granting the writ."[28] [29]

Notes

1. 77 Virginia 415.

2. Hill vs. Boston, 193 Mass. 569, 79 N. E. Rep. 825.

3. 15 Utah 1, 49 Pac. Rep. 747.

4. Where it is shown that no legal designation has been made by the Board of Elections, the Court may, notwithstanding the prayer for an order, require that a particular newspaper be designated, command the board to perform the duty devolving on it by law. People vs. Voorhis, 115 App. Div. 218, 100 N. Y. 927.

5. To compel Board of Registry and Election to make up and sign such statement as is required by P. L. 1903, p. 617, p. 15.

Freeman vs. Registry and Election of Metuchen (N. J. Law), 67 A. 713. In such case the ballot boxes may be opened if such statement cannot be prepared without doing so. Id.

6. Cosgriff vs. San Francisco Election Com'rs (Cal.), 91 P. 98.

7. Jenny vs. Alden, 79 Vt. 156,64 A. 609.

8. Robinson vs. McCandless, 29 Ky. L. R. 1088, 96 S. W. 877. One to whom a certificate of nomination has been issued. State vs. Goff, 129 Wis. 668, 109 N. W. 628.

9. People vs. Edgar County Sup'rs, 223 Ill. 187, 79 N. E. 123.

10. Under Rev. Laws, c. 11, p. 421, the Supreme Judicial Court has jurisdiction to issue mandamus to compel registrars not to count such a ballot cast at a local option election. Brewster vs. Sherman (Mass.), 80 N. E. 821.

11. Lehman vs. Pettingell (Colo.), 39 P. 48; State vs. Mason (Wash.), 88 P. 126.

12. Laws, 1896, p. 964, c. 909, P. 111. People vs. Beam, 183 N. Y. 266, 80 N. E. 921.

13. Where "questioned" ballots were lodged with Clerk of County Court for safe keeping, but had not been preserved in manner required by law, it was held mandamus would not issue to require election of officers to assemble and certify as to whether

such ballots returned to them had been counted, and if so, for whom. Childress vs. Pinson (Ky.), 100, S. W. 278. Mandamus will not issue to compel election officers to sign certificates attached to stub book from their precinct, where duplicate certificate used by election commissioners in canvassing returns has been presented and signed by officers. Id.

14. Shannon's Code, pp. 5335, 5337. State vs. Willett, 127 Tenn. 334, 97 S. W. 299.

15. Adequate remedy is given by Code, 1904, pp. 83a, 86. Spitler vs. Guy (Va.) 58 S. E. 769.

16. If the recount is erroneous the remedy by quo warranto is open. Dickenson vs. Cheboygan County Canvassers, 148 Mich. 513, 15 Det. Leg. N, 196, 111 N. W. 1075.

17. Lauritsen vs. Segard, 99 Minn., 313, 109 N. W. 404. Mandamus cannot be invoked to settle a doubtful claim to an office or to have the title to an office adjudicated upon as between adverse claimants. Hoy vs. State (Ind.), 81 N. E. 509.

18. Candidate claiming election to council. State vs. Kendall (Wash.), 87 P. 821.

19. State vs. Mason (Wash.), 88 P. 126.

20. Rev. Laws, c. 192, p. 5. Brewster vs. Sherman (Mass.), 80 N. E. 821.

21. Candidate claiming election to a mu-

nicipal council. State vs. Kendall (Wash.), 87 P. 821. The candidates for Sheriff and Treasurer of a county on the same ticket may join, under Code Civ. Prac., p. 10. Lehman vs. Pettingell (Colo.), 89 P. 48.

22. Mandamus proceedings to compel calling of election to vote upon disincorporation of a city, as required by Henning's Gen. Lawp., 989, p. 1, must be brought against Board of Trustees. Taylor vs. Burke (Cal. App.), 91 P. 814.

23. State vs. Kendall (Wash.), 87 P. 821.

24. Where petition is for mandamus to compel inspectors of town meeting to declare and clerk to enter result of meeting, if inspectors have failed to count ballots, such count is fairly within prayer of petition, and proceedings will not fail because it is not expressly requirested. People vs. Armstrong, 116 App. Div. 103, 101 N. Y. S. 712.

25. Petition for mandamus to erase from registration books, residents and members of Soldiers' Home will not be granted where names of such persons are not stated and some of them are entitled to registration. State vs. Willett, 117 Tenn. 334, 97 S. W. 299. Petition for mandamus to compel election commissioners to place the names of nominees upon official ballot under name and device of a certain party is insufficient if it

fails to allege that certificate of nomination designated such title and device as required by Burn's Ann. St. 1901, p. 6215. State vs. Board of Election Comrs. of Marshall County, 167 Ind. 276, 78 N. E. 1016.

26. Pierce's Code, pp. 1420, 3521. State vs. Kendall (Wash.) 87, p. 821.

27. Costs awarded against board where writ issued at suit of candidate claiming election. State vs. Kendall (Wash.) 87, p. 821 M.

28. People vs. Voorhis, 186 N. Y. 263; 78 N. E. 1001.

29. Current Law, Vol. 9, pp. 1052-4.

Section 49. Right of Private Persons to Enforce Public Right or Duty Relative to Elections by Writ of Mandamus

"There is a great weight of American authority in favor of the doctrine that any private person may move, without the intervention of the attorney general, for a writ of mandamus to enforce a public duty not due to the government as such."[1]

In the great majority of States, as an application of this principle it is held that a private person, as relator, may enforce by mandamus, a public right or duty relating to elections without showing any special in-

terest which he possesses in the results of the election distinct from the interest of the public.[2]

In Texas it has been held that an individual need not sue as relator, but may bring the suit in his own name.[3]

In Michigan, on the other hand, a private individual must show some special and distinct interest in himself in the result of the election, in order to be permitted to enforce public rights, relative to such election, by mandamus.[4]

In some jurisdictions, under statutes providing that the writ of mandamus may issue on the application of the party beneficially interested, it has been held that a private person is beneficially interested, and as relator may enforce by mandamus a public right or duty relating to elections, without showing an interest therein different from the interest of the public at large.[5]

Notes

1. Chief Justice Gray in Attorney General vs. Boston, 123 Mass. 460, 479.

2. Brewster vs. Sherman et al., 195 Mass. 222; 11 Am. and Eng. Ann. Cases, 417; Rizer vs. People, 18 Colo. App. 40, 69 Pac. Rep. 315; State vs. Mason, 45 Wash. 234, 88

Pac. Rep. 126; State vs. Jefferson County, 17 Fla. 707; Commonwealth vs. Tree, 4 Phila. 362; State vs. St. Louis Public Schools, 134 Mo. 296; 35 S. W. Rep. 617; State vs. Shropshire, 4 Neb. 411.

3. Kimbery vs. Morris, 87 Tex. 637, 313 S. W. Rep. 808.

4. Debridge vs. Green, 29 Mich. 121; Smith vs. Saginaw, 81 Mich. 123, 45 N. W. Rep. 964.

5. Note to Am. and Eng. Ann. Cases, Vol. 11, p. 420. Chumasero vs. Potts, 2 Mont. 242; State vs. Brown, 38 Ohio St. 344; State vs. Tanzey, 49 Ohio St. 656, 38 N. E. Rep. 750; State vs. Lien, 9 S. Dak. 297, 68 N. W. Rep. 748. See also Smith vs. Lawrence, 2 S. Dak. 185, 49 N. W. Rep. 7.

Section 50. Certiorari

Certiorari is a remedy which may occasionally be used to advantage in election contests.

Certiorari may be brought to annul an injunction, on the ground that it is issued without jurisdiction, where the remedy by appeal is inadequate; as, for example, in the case of an injunction restraining the use of voting machines where appeal cannot be heard until after election.[1]

Ballot boxes containing ballots, keys and

reports of election officials are not judicial records reviewable under a writ of certiorari.[2]

Notes

1. United States Standard Voting Machine Company vs. Hobson, 132 Iowa 38, 109 N. W. Rep. 458.
2. State vs. Reynolds, 190 Mo. 578, 89 S. W. 877.

Section 51. Prohibition

The writ of prohibition can be seldom used in election contests. It will not lie to prevent ministerial acts;[1] to prevent a person from holding an office to which he is not entitled;[2] or to prevent a chancery judge from issuing an injunction in election cases.[3]

The writ may be used to prevent canvassing boards from exercising judicial powers.[4]

Notes

1. Greir vs. Taylor, 4 McCord L. (S. Car.) 206.
2. Bucker vs. Verive, 63 Cal. 304.
3. Ex parte Reid, 50 Ala. 439.
4. Brazie vs. Fayette County, 25 W. Va. 23.

Section 52. Injunctions

A court of equity may issue an injunction in matters relative to elections, the same as in other controversies. The proper use of injunctions in election matters, however, has a limited scope.

"An injunction will be granted to restrain a county clerk from certifying to judges of election, fraudulent and fictitious registrations,[1] and a temporary injunction will issue to restrain a county committee for party primaries,[2] but an injunction will not issue to direct or control the mode in which an election shall be held[3] to restrain the placing of the names of candidates duly nominated upon the official ballot on the ground that there is no vacancy to be filled at the election,[4] or to restrain a county clerk from canvassing the vote on the question of granting a franchise on the ground that the election was illegal.[5] In Colorado, the district court has jurisdiction to issue an injunction to restrain the county clerk from certifying to judges of election fraudulent and fictitious registrations made by him.[6] Any member of a political party may sue to enjoin the county committee of such party from enforcing an illegal system of enrollment for party primaries.[7] The complaint in an action for

injunction must allege facts sufficient to constitute a cause of action."[8 9]

In Dickey vs. Reed,[10] the court held that a court of chancery has no power to restrain, by injunction, a board of canvassers from canvassing the returns of an election, where the law under which the election was held, neither in terms nor by implication confers such power, and where there are no facts before the court which requires it to take judicial cognizance, and hear, adjudicate and decree.

"Whilst the writ of injunction is one of the most important in the law, and is, in fact, indispensable to the complete administration of justice, it is liable to great abuse, and it would not be wise, nor would it promote justice, to extend its use to cases of doubtful right, or to accomplish ends where there are other adequate remedies.

"A writ of injunction, issued in a matter where the court could not, under any circumstances, have power to hear, determine and decree in reference to such matter, is coram non judice, and void.

"Where a writ of injunction is issued by a court which has power over the subject matter, and authority to take jurisdiction, it must be obeyed, but where the power of the court

is wholly wanting, the writ is void, and can legally operate on no one, nor can any one be punished for contempt for disobeying it.

"It was not designed, when the fundamental law of the State was framed, that either department of government should interfere with or control the other, and it is for the political power of the State, within the limits of the constitution to provide the manner in which elections shall be held, and how they shall be contested, and the courts can not interfere."

If a court of equity issues an injunction relative to any aspect of an election, and such injunction is beyond the power of the court, the officials against whom the injunction is issued may disregard it, without being in contempt of court for such disobedience.[11]

In some cases the question as to whether an injunction can properly be issued is complicated by the presence of other elements than those directly concerned with the subject of elections. The problem is not unlike that relative to injunctions against criminal acts. It was formerly held, by an unbroken line of decisions, that no injunction would lie against the commission of a criminal act. The recent decisions have modified this to

the extent of holding that if a threatened act will interfere with property rights it may properly be enjoined, even although the act may also constitute a crime. It would seem as if a like principle would be properly applicable in election cases. In other words, a court of equity may properly enjoin a threatened trespass upon property, even although there is involved indirectly an election dispute, in relation to which equity would have no authority to issue an injunction. Under this theory an equity court might enjoin any interference with the possession of a hall, in which a meeting of a political convention had been called.

Notes

1. Granting such an injunction does not violate Const. Art. 2, p. 5, which declares "that all elections shall be free and open, and that no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage." Aichels vs. People (Colo.) 90, p. 1122.

2. Brown vs. Cole, 54 Misc. 278, 104 N. Y. 109. But a permanent injunction will not be granted restraining chairman of such a committee from putting into operation certain alleged illegal rules and regulations for conduct of primaries, where primaries have

been held and there was no effort to enforce such rules and regulations are in force or threatened to be enforced. (Brown vs. Cole, 105 N. Y. S. 196), but upon dismissal of such suit, if the rules and regulations are illegal, no costs will be allowed. (Id.)

3. Injunction will not issue to restrain use of voting machines. United States Standard Voting Mach. Co. vs. Hobson, 132 Iowa 38, 109 N. W. 458.

4. Sherlock vs. District Ct. (Colo.) 38, p. 396.

5. Such question can be determined in the proceeding provided by Civ. Code, p. 289, to test validity of franchise. Vickery vs. Wilson (Colo.) 90, p. 1034. Such an injunction will not be granted because pending determination of validity of franchise by proceedings in quo warranto, plaintiff will suffer loss from depreciation of value of his stock in a rival company. Id.

6. Aichele vs. People (Colo.) 90, p. 1122.

7. Brown vs. Cole, 54 Misc. 278, 104 N. Y. S. 109.

8. Facts alleged in complaint in action to enjoin county committee of political party from enforcing illegal system of enrollment for party primaries held to constitute cause of action. Brown vs. Cole, 54 Misc. 278, 104 N. Y. S. 109.

9. Current Law, Vol. IX, p. 1054.

10. 78 Ill. 261.

11. Walton vs. Develing, 61 Ill. 201; Darst vs. People, 62 Ill. 306.

Section 53. Right of Contestant for Office to Enjoin Incumbent from Performing Public Duties Pending Election Contest

Where opposing candidates for public office both claim to have been elected to the office, an injunction restraining the party who has possession of the office from exercising the functions pertaining thereto, pending an investigation of the claims of the parties, will not be granted at the suit of the adverse claimant. The courts are harmonious upon this point.[1]

In Vette vs. Byington, the court said: "It is a rule, long established in this State, and indeed it is a general rule . . . that a court of chancery will not interfere by injunction, before a trial at law, in favor of an officer de jure against an illegal claim when the latter is already in possession of the office."

The strongest and soundest reason for this legal principle is one based upon public policy, as great public inconvenience would result if the exercise of the duties of the office were suspended.[3] Another reason for this rule is found in the existence of a plain,

complete and adequate remedy at law, either under statutory provisions regulating election contests, or by quo warranto proceedings.[4]

In Gilroy vs. Appeal,[5] the court said:

"The only proper remedy by which such questions may be determined in quo warranto, which is a plain, simple, adequate, and complete remedy. It is no more cumbrous or dilatory than the remedy of injunction, and it is much more comprehensive, complete and appropriate. And the equitable jurisdiction to restrain by injunction will never be exercised where another plain and adequate remedy exists."

"While equity has no jurisdiction to determine the right to hold and exercise a public office, the appropriate remedy being by quo warranto proceedings, yet where the parties have agreed upon the record to waive the question of jurisdiction and the court below has considered the case as if it had been brought before it by writ of quo warranto, a decree awarding an injunction will be regarded as equivalent to a judgment of ouster in quo warranto proceedings."[6]

In a few States the question has arisen as to whether the State statutes authorized the issuance of an injunction in this class of con-

troversies; in all the cases on this point it was decided that the injunction was not authorized.[7]

Notes

1. Note to Am. and Eng. Ann. Cases, Vol. XVI, p. 1052, citing Alabama, Little vs. Bessemer, 138 Ala. 127, 35 So. 64; Arkansas, Lucas vs. Futrall, 84 Ark. 540, 106 S. W. 667; Colorado, Lawson vs. Hays, 39 Colo. 250, 89 Pac. 968; Georgia, Davis vs. Dawson, 90 Ga. 817, 17 S. E. 110; Illinois, Deemar vs. Boyne, 103 Ill. App. 464 (see also Burgess vs. Davis, 138 Ill. 582, 28 N. E. 817, affirming 37 Ill. App. 353); Indiana, Beal vs. Ray, 1 Ind. 554; Iowa, Vette vs. Byington, 132 Ia. 487, 109 N. W. 1073; Kansas, State vs. Durkee, 12 Kan. 308; Kentucky, see the reported case; Louisiana, State vs. Rost, 47 La. Ann. 65, 16 So. 780; Minnesota, Burke vs. Leland, 51 Minn. 355, 53 N. W. 716; Mississippi, Moore vs. Caldwell, Freem. 222; Missouri, State vs. Withrow, 154 Mo. 397, 55 S. W. 460; Nebraska, State vs. Kearney, 28 Neb. 103; New York, People vs. Farley, 1 How. Pr., N. S. 71; North Carolina, Jones vs. Granville, 77 N. C. 280; Ohio, Harding vs. Eichinger, 57 Ohio St. 371, 49 N. E. 306; Pennsylvania, Hagner vs. Heyberger, 7 W. & S. 104, 42 Am. Dec. 220; So. Carolina, State vs. Rice, 66 S. C. 1, 44 S. E. 80; Tennessee, Adcock vs. Houk, 122 S. W. 979; Texas,

McAllen vs. Rhodes, 65 Tex. 348; Virginia, Kilpatrick vs. Smith, 77 Va. 347; West Virginia, Swinburn vs. Smith, 15 W. Va. 483.

2. 132 Ia. 487, 109 N. W. 1073.

3. Patterson vs. Hubbs, 65 N. C. 119.

4. Deemar vs. Boyne, 103 Ill. App. 464; Harding vs. Eichinger, 57 Ohio St. 371, 48 N. E. 306; Hotchkiss vs. Keck, 84 Neb. 545, 121 N. W. 579.

5. 100 Pa. St. 5.

6. Hayes vs. Sturges, 215 Pa. St. 605, 64 Atl. 828.

7. Patterson vs. Hubbs, 65 N. C. 119; State vs. Alexander, 107 Ia. 177, 77 N. W. 841; State vs. Herreid, 105 N. D. 16, 71 N. W. 319.

Section 54. Contests Before Legislative Bodies

The courts do not have the power to try contested elections involving seats in the Congress of the United States, or in the State Legislature. The Constitution makes each house of Congress, the judge of the elections, returns and qualifications of its members.[1] Either house can decide all questions both of law and of fact necessary to determine the right of any individual who may claim to be one of its members.[2] The returns from the State authorities are only prima facie evidence.[3] A decision made by either house

cannot be reconsidered and reversed.[4] The courts have no jurisdiction over questions involving the right to a seat in either branch of Congress.[5]

The Constitutions of the different States contain provisions similar to that in the Federal Constitution. In a number of States inferior legislative bodies are also given the right to judge of the election and returns of their members.[6]

Every legislative body which has the power to pass upon the returns and qualifications of its members may (in the absence of express constitutional or statutory provisions on the subject) adopt either general rules of procedure for all such cases, or special rules for each particular case.

Notes

1. United States Constitution, Art. I, Sec. V, Clause I.

2. Baker vs. Bart, El. Cases 92.

3. Spaulding vs. Mead, Cl. & H., El. Cases 157.

4. The Louisiana Cases, Taft El. Cases, 426; Corbin vs. Butler, Taft El. Cases, 582.

5. State vs. Crawford, 28 Fla. 441; McDill vs. Board of State Canvassers, 36 Wis. 505.

6. Foley vs. Tyler, 161 Ill. 167; People

vs. Bingham, 82 Cal. 238; People vs. Essex County, 69 Hun, (N. Y.) 406; Stearns vs. Wyoming, 53 Ohio St. 352.

Section 55. Grounds for Election Contests

The grounds upon which election contests may be based are so numerous and divers that it is difficult to give any complete classification or enumeration of them. Fraud of one kind or another in election is the most general ground for election contests. There is a marked difference in its effect upon the election of fraud perpetrated by election officials, and fraud at the election committed by third persons, without any guilt on the part of the election officials. Fraud by the judges and clerks of election will make the whole returns from a precinct valueless.[1] A case of fraud and illegality, however, may be made without in any way implicating the election officials.[2]

Fraud by third persons merely destroys the prima facie accuracy of the returns and the true vote may be shown by evidence.[3] The cases are not in entire harmony as to exactly where the burden of proof will rest in such cases.

"The rule of purging the poll by deducting the illegal votes proportionately from the

different candidates, cannot properly be adopted in cases of fraud, as this would give the fraudulent party the benefit of one-half of the fraudulent votes, and deduct from the honest party the same number. Therefore, where there is no evidence by which an exact, or nearly exact, legal result can be reached, the whole poll should be rejected, in which case each party will receive the vote which he proves to have been cast for him; but this rejection of the whole poll should never be permitted where the true result can be otherwise reached."[4 5]

It is an old principle of the Common Law, and it is set out in the Constitution of many of the States of the country, that all elections ought to be free, and violence and intimidation will therefore be a sufficient basis for setting aside elections or for rejecting the votes of certain precincts.[6]

It is a well established principle that the State militia should never be used at the polls on election day except when such drastic action is absolutely necessary to prevent the holding of an election being prevented by violence; and furthermore, that such militia, except in cases of absolute necessity, should not be called out on election day even for purposes entirely unconnected with election.

The revised statutes of the United States[7] prohibits the bringing of armed troops to the polling place except to keep the peace or to repel the armed enemies of the United States. The use of the police at polling places is unfortunately generally necessary to a certain degree, but any intimidation on the part of the police, deputy sheriff, marshal, or other similar officer, will be just as effective to vitiate an election as an interference by the regular army.[8]

The rule as to the degree of intimidation or violence which will be sufficient to thus vitiate an election is not unlike the rule as to the degree of intimidation or force necessary to render a contract voidable on the ground of duress. In the case of elections, the intimidation or violence must be of such a character and degree that a man of ordinary firmness and courage would be deterred from voting. The intimidation need not be in the nature of threats of physical violence. It has been held that where there was a combination on the part of employers to threaten their workingmen with the loss of their occupation unless they voted as directed, this was sufficient to render the election void if the intimidation was extensive enough to affect the result.[9] It has even been held that

threats of social[10] or religious[11] ostracism may have such an effect in intimidating voters as to render an election void.

Bribery is a sufficient ground for setting aside an election.[12] A great deal of confusion often arises from the fact that two entirely different legal principles as to bribery are confused together. One rule of law has to do with the effect of bribery in disqualifying a candidate guilty of such an act from holding the office to which he has been elected; and the second relates to the vitiation of the election itself on account of the bribery both by Common Law and statute in England,[13] and by Constitutional or statutory provisions in most of the States in this country.[14] Bribery by a candidate personally or by any person in his behalf with his knowledge or consent disqualifies such candidate from holding the office to which he is elected. In such cases the number of the votes bought, or the question as to whether or not such votes could change the result of the election are absolutely immaterial. The guilty candidate is disqualified as a punishment for his illegal act and not on the ground that he did not receive a majority of the votes legally cast. The rule is very different where the bribery is by a third person with no proved

authority or consent from the candidate himself. If the bribery is general enough it may in an extreme case be a sufficient ground for holding the election void or to throw out the entire vote of certain precincts or election districts. A more general result is the rejection of the votes which have been so bought.[15]

In State vs. Olin,[16] the Supreme Court of Wisconsin said:

"In our form of government, where the administration of public affairs is regulated by the will of the people, or a majority of them, expressed through the ballot box, the free exercise of the elective franchise by the qualified voters is a matter of the highest importance. The safety and perpetuity of our institutions depend upon this. It is, therefore, particularly important that every voter should be free from any pecuniary influence. For this reason the attempt by bribery to influence an elector in giving his vote or ballot is made an indictable offense. . . . Can a vote thus obtained, in direct violation of the statute, be considered a valid or a legal vote? If it can, then the very object of the statute, which is that it shall not be so obtained, is defeated. We are of opinion that such votes are illegal and that the judge was right in directing the jury to disregard

them. This conclusion is sustained by the authorities, so far as we have been able to find any."

While a candidate may legally employ persons to work for him in his campaign as canvassers, speakers, etc., such employment may constitute bribery where the real purpose of the employment was to secure the vote rather than the services of the persons employed.[17] Or where the person employed is compelled as a condition for such securing such employment to agree to vote for the candidate employing him.[18]

The making of a loan to a voter,[19] or even the payment of a past debt,[20] may be sufficient to constitute bribery when the loan or the payment is for the purpose of influencing the vote of the person receiving it.

The sale of goods for a price far below the true value of the article, or the purchase of goods far above their value may constitute bribery.[21]

In a Wisconsin case,[22] where a candidate had agreed to perform the duties of the office for four hundred dollars less than the compensation allowed by law, it was held that while this did not technically constitute bribery, still it was so strongly against public

policy that the votes secured through this promise should be rejected.

In addition to the forms of bribery already referred to, there are an almost unlimited number of other indirect methods of bribery which would be sufficient to invalidate any votes which may be secured thereby. It is said that the use of undue influence upon voters may be sufficient either to render the election void or to throw out certain votes. The scope of the doctrine is very vague and uncertain and the possibility for such undue influence has been mainly done away with by the adoption of the Australian ballot system, and the principle is of little importance in this country.

Relief will not be granted on a doubtful showing[23] to review a void election,[24] or to change what could not change the result.[25]

Notes

1. Knox County vs. Davis, 63 Ill. 405.

2. Whaley vs. Thompson, 15 Tex. Ct. Rep. 207, 93 S. W. Rep. 212.

3. Knox County vs. Davis, 63 Ill. 405; Foley vs. Tyler, 161 Ill. 167; Washburn vs. Voorhis, 2 Bart. El. Cas. 54.

4. LeMoyne vs. Farwell, Smith El. Cas. 411.

5. 10 American and Eng. Encyc. of Law, p. 775.

6. Jones vs. Glidewell, 53 Ark. 161; Hodge vs. Jones, 43 S. W. 41.

7. Section 2002.

8. English vs. Peele, 48 Cong. H. Rep. 1547.

9. Duffy vs. Mason, 1 Ellsw. El. Cas. 362.

10. Richardson vs. Rainey, 1 Ellsw. El. Cas. 233.

11. Trench vs. Nolan, 6 Ir. Rep. C. L. 464.

12. Whaley vs. Thomason, 15 Tex. Ct. Rep., 93 S. W. Rep. 212.

13. In re Launceston Election Petition L. R., 9 C. B. 626.

14. State vs. Elting, 29 Kan. 397; State vs. Collier, 72 Mo. 13; State vs. Dustin, 5 Oregon 375.

15. Commonwealth vs. Shaner, 3 W. & S. (Pa.) 338; White's Contested Election, 4 Pa. Dist. Rep. 363.

16. 23 Wis. 327.

17. Reg. vs. Stewart, 16 Ont. Rep. 583.

18. Abbott vs. Frost, Smith El. Cas. Tor; Gloucester Case, 20 Mal. & H. El. Cases 62.

19. Lynne vs. Regis, 1 P. R. & B. El. Cas. 35.

20. McKay vs. Glen, Hodgin's Election Cas. 751.

21. Bergin vs. Macdonald, Hodgin's Election Cas. 547.

22. State vs. Purdy, 36 Wis. 213.
23. In re Slattery, 100 N. Y. S. 419.
24. Phillips vs. Brynus, 39 So. 911.
25. In re Burrell, 100 N. Y. S. 470.

Section 56. Effect of Irregularity or Fraud in Nomination of Candidate Upon the Validity of Election

The American rule is that all questions as to irregularities or fraud in the nomination of candidates to be voted upon in any election must be raised prior to such election, and that the title of a person legally chosen at the election cannot be assailed on account of any flaw in the legality of his nomination.[1]

In Attorney-General vs. Campbell,[2] the Supreme Court of Massachusetts said: "We are of opinion that, while the provisions as to holding caucuses for the nomination of candidates and as to the filing of nomination papers are binding upon the officers for whose guidance they are intended, they may be disregarded in determining the validity of a subsequent election, if it plainly appears that the will of the majority of the electors is fairly expressed by their ballots."

"The following irregularities have been held not to invalidate elections: Nominations made by person or political party not entitled

to make nominations;[3] nomination to fill vacancy caused by resignation of candidate, nomination not being made in proper manner;[4] party nomination improperly made by petitions;[5] nomination papers altered by candidate, no fraud being shown;[6] failure to call caucus in proper manner;[7] failure to file certificate of nomination;[8] failure to file certificate in time;[9] failure to set out in certificate what statute required;[10] failure to acknowledge properly certificate of nomination;[11] failure on part of clerk to make proper publication of nominations.'' [12] [13]

The general principle of the law here involved is well stated in the case of Jones vs. State,[14] as follows:

''It is the duty of the courts to uphold the law by sustaining elections thereunder that have resulted in a full and fair expression of the public will, and, from the current of authority, the following may be stated as the approved rule: All provisions of the election law are mandatory if enforcement is sought before election in a direct proceeding for that purpose; but after election, all should be held directory only, in support of the result, unless of a character to effect an obstruction to the free and intelligent casting of the vote, or to the ascertainment of the

result, or unless the provisions affect an essential element of the election, or unless it is expressly declared by the statute that the particular act is essential to the validity of an election, or that its omission shall render it void."

The English rule on this question is contrary to the American rule, it being held in England that the validity of an election may be destroyed by irregularities, or fraud, in the nomination of candidates.[15]

Notes

1. Territory ex rel Willis vs. Kanealii, 17 Hawaii 243.

2. 191 Mass. 497, 78 N. E. Rep. 144.

3. Schuler vs. Hogan, 168 Ill. 369, 48 N. E. Rep. 195; Bowers vs. Smith, 111 Mo. 45, 20 S. W. Rep. 102, overruled McKay vs. Minner, 154 Mo. 608, 55 S. W. Rep. 866.

4. Baker vs. Scott, 4 Idaho 596, 43 Pac. Rep. 76; Kulp vs. Bailey (Tex., 1905), 89 S. W. Rep. 957.

5. State vs. Fransham, 10 Mont. 273, 48 Pac. Rep. 1.

6. State vs. Bunnell (Wis., 1907), 110 N. W. Rep. 177.

7. Atty. Gen. vs. Campbell, 191 Mass. 497, 78 N. E. Rep. 133.

8. Peabody vs. Nurch (Kan., 1907), 89 Pac. Rep. 1016.

9. Blackmer vs. Hildreth, 181 Mass. 29, 63 N. E. Rep. 14; State vs. Deputy State Supervisors, 9 Ohio Cir. Dec. 427.

10. Owen vs. Milhoan, 72 Kan. 701, 83 Pac. Rep. 1044.

11. Jones vs. State, 153 Ind. 440, 55 N. E. Rep. 229. See also Bragdon vs. Navarre, 102 Mich. 259, 60 N. W. Rep. 277.

12. Allen vs. Glynn, 17 Colo. 338, 29 Pac. Rep. 670.

13. 7 American and English Annotated Cases, 840 note.

14. 153 Ind. 440, 55 N. E. Rep. 229.

15. Reg. vs. Parkinson, L. R. 3 Q. B. 11.

Section 57. Pleading and Evidence in Election Contests

Pleadings in election cases do not strictly follow the rules of either Common Law, Equity or Code Pleading, but much more closely resemble the last two systems of pleading than the first.

In the statutory provisions relative to election contests the forms of the pleadings are generally not treated. A plain statement of the facts upon which the complainant relies for relief are generally sufficient.

An election contest, being a special proceeding, the facts giving the court jurisdic-

tion must appear upon the face of the pleadings.[1]

A person contesting the election of an officer must always set out in his pleading that he was a candidate for the same office.[2] A bill of particulars may be ordered where the petition does not set out the irregularities with sufficient particularities.[3] A petition in an election contest may be bad as being too indefinite. As for example a petition which alleged that the election judges in each and every precinct threw out a large number of legal votes given to the contestant, for the reason that the cross was not placed in the proper position.[4] In another case the allegation that "a number of illegal votes had been polled for the incumbent against the contestant" was also held to be too indefinite.[5]

The allegation that "a large number of legal voters desired and attempted to cast their votes, but with the knowledge, consent and connivance of the judges of election, were by violence and threats prevented from so doing" was also held to be too indefinite.[6]

In some cases it has been held that it is necessary to allege that the illegalities complained of changed the result,[7] while in other cases it has been held that this need not be alleged.[8]

In Nickols vs. Ragsdale[9] the ground of contest filed in a proceeding to contest an election for sheriff stated that the contestor received 1,716 votes, and the contestee 1,719 votes; that illegal votes were cast for the contestee in eight townships of the county, and that, but for such illegal votes, the contestor would have been elected. Held that, as illegal votes were cast for the contestee in eight townships, the number of such votes could not have been less than eight, and as these, taken from the vote of the contestee, would show that the contestor was entitled to the office, the grounds of contest were well stated.

"An election petition which sets forth mere conclusions of law, and not of fact, which alleges mere irregularities in relation to the qualification of the election officers, time of opening the polls, etc., and which avers that votes were irregularly received, without setting forth facts which would show that the rejection of these votes would change the result, will be quashed, as it does not set forth affirmative averments of fact from which the court, if the facts alleged were admitted or proved to be true, can determine that the petitioners were entitled to the relief prayed for, or to some relief."[10]

The complainant must allege that he was lawfully elected to the office, but it is not fatal if he fails to allege that he is eligible to such office.[11]

The method and form of the necessary pleading to be filed by the defendant in an election contest depends mainly upon the constitution of the different states, and differs greatly in the different jurisdictions. Thus, in Alabama it is not necessary for the defendant to file any plea to the contestant's statement.[12] In Illinois the defendant may set up any defense which shows that the complainant is not entitled to the relief he seeks.[13]

In contested election cases, tried before the courts, the ordinary rules of evidence are enforced; but in contested elections, tried before legislative assemblies, the rules restricting the admission of evidence are very greatly relaxed.[14]

The returns of an election or the certificate based upon them, if they are regular in form are prima facie evidence of the facts stated on their face.[15] However, if the ballots have been preserved, they are better evidence than the returns and should be recounted where there is a contest.[16] But, before a recount should be allowed to prevail over the original returns, it must be shown that the ballots

have not been tampered with.[17] The mere fact that the ballots have not been kept in the manner prescribed by law does not necessarily render them inadmissible as evidence,[18] but does throw upon the person seeking to introduce them the burden of proof to show that they have not been tampered with.[19] The statutory provisions as to the keeping of ballots are directory and not mandatory. In Hughes vs. Holman,[20] the court said: "It is true that returns should be guarded with jealous care, and all the forms of law should be observed, but these rules are only directory. . . . If the rule were otherwise and all the statutory provisions mandatory, the precinct canvassing board might falsify the returns, and by that means perpetuate in office or elect any person whom they choose. The only act necessary upon the part of the judges and clerks of election for this purpose would be to send the ballots cast by some unauthorized person to the county clerk, and it would not matter if it could be shown by the testimony of a multitude of unimpeachable witnesses that such person had exercised the greatest care that the ballots, when delivered to the county clerk, were in the exact condition as when received, such evidence could not be admitted to overcome the

prima facie correctness of the returns. There would be neither reason nor justice in such a rule."

Poll books, if required by law to be kept, are the best evidence as to who voted.[21] If the poll books are still in existence and come from the proper custody, no other evidence is admissible to show who voted.[22] If no poll books were kept, or if they have been destroyed, or are rejected as evidence on account of fraud or other reason, other evidence may be introduced as to who voted.

In general, evidence may be received as to the existence of any fact, which, if proved, would render the election void, throw out the entire vote of the precinct or throw out any individual vote. Evidence may be introduced to show that any of the voters alleged to have voted did not live in the precinct or were otherwise unqualified, or did not themselves cast the vote. The "best evidence rule" is recognized and followed in the trial of election cases,[23] although, perhaps, not as rigidly as in other legal proceedings. The rule against hearsay evidence is strictly followed. Public rumors, newspaper reports, etc., as to the number of votes cast, etc., are not admissible. The opinions of witnesses are not admissible unless the question is one upon which

expert testimony may properly be introduced.[24] Thus, in Pattern vs. Coates,[25] it was held by the Supreme Court of Arkansas that witnesses should not be permitted to give their opinion as to whether an election was free or fairly conducted.

Where the election returns are illegal or wanting, secondary evidence may be introduced to show the actual vote; and any candidate may introduce evidence to prove the votes cast for him.[26]

Notes

1. Gillespie vs. Dion, 18 Mont. 183, 44 Pac. Rep. 954.
2. Edwards vs. Knight, 8 Ohio 375.
3. Mann vs. Cassidy, 1 Brewst. 11.
4. Smith vs. Harris, 18 Colo. 274, 32 Pac. Rep. 616.
5. Lunsford vs. Culton, 15 Ky. Law Rep. 504.
6. Soper vs. Sibley County Commissioners, 46 Minn. 274, 48 N. W. Rep. 112.
7. Lanier vs. Galatos, 13 La. Ann. 175.
8. Steele vs. Martin, 6 Kan. 430.
9. 28 Ind. 131.
10. In re Contested Election of Burke, 22 Pitts. Leg. J. 193.
11. Rutledge vs. Crawford, 91 Cal. 526, 27 Pac. Rep. 779.

12. Griffen vs. Wall, 32 Ala. 149.
13. Talkington vs. Turner, 71 Ill. 234.
14. Stimpson vs. Breed, — and R. (Mass. El. Cas.) 260.
15. People vs. Thacker, 7 Laws (N. Y. 274); Territory vs. Pyle, 1 Oregon 149; People vs. Miller, 16 Mich. 56.
16. Beall vs. Albert, 159 Ill. 127; Newton vs. Newell, 26 Minn. 529.
17. Murphy vs. Bottle, 155 Ill. 182; Coglar vs. Beard, 65 Cal. 58; Gooding vs. Wilson, Smith El. Cas. 79.
18. Hughes vs. Hartman, 23 Oregon 482; Apple vs. Barcroft, 168 Ill. 649.
19. Kingery vs. Berry, 94 Ill. 515.
20. 23 Oregon 981.
21. Newark's Case, 1 Fras El. Cas. 277.
22. Olive vs. O'Rilet, Minor (Ala.) 410.
23. Sinks vs. Reese, 19 Ohio St. 306.
24. Convery vs. Conger, 63 N. J. 658.
25. 41 Ark. 111.
26. Norris vs. Handley, Smith El. Cas. 73.

Section 58. Waiver of Right to Contest the Legality of an Election by Participating Therein

That a voter, not himself a candidate for office, cannot be held to have waived the right to contest the legality of an election through his taking part in the election, is held in all the decisions which refer to this question.[1]

In State ex rel. Birchmore vs. State Board of Canvassers:[2] the court said, on this point:

"Therefore this election must be held invalid unless, as relator contends the respondents have waived their right to contest the election by taking part in it without objection to the arrangements.

"By waiver is meant the intentional relinquishment of a known right, or such conduct as warrants an inference of the relinquishment of such a right." . . .

"From the nature of the doctrine it may and seems generally to be applied to all rights to which the party is legally entitled. A limitation, however, is usually recognized, and where such waiver would be against public policy it is not allowed to be operative. Would such a waiver as is claimed here by the relator be against public policy? The provision in the Constitution requiring popular elections to be by ballot had in view of the purity of elections and the prevention of intimidation of voters at the polls. From earliest times such results have been recognized as highly beneficial to municipalities and commonwealths. While it might appear that primarily the object was to secure benefits to electors, yet we think this purpose can only be regarded as a means to an end. With

the right of the individual elector secure, necessarily it must follow that the State's welfare in this respect would be safeguarded. To attempt to enumerate the advantages of a well-regulated franchise would unnecessarily prolong this opinion, yet many of them must be evident to the most casual observer. Therefore, to hold that the respondents in this case are estopped from contesting the election because they cast their ballots in the election without protest at the time, we think would be an invasion of the integrity of the franchise system of the State."

It has also been held, that the members of a county canvassing board of election returns, who had canvassed the vote on a county seat question, had not waived, thereby, their right to deny their own right to act in the matter.[3]

Candidates, however, may be estopped from contesting the legality of an election in which they participated and were defeated. Thus, it has been held that a person who was a candidate for a nomination at his party caucus could not afterwards object to the regularity of such caucus because votes of persons not members of the party were received thereat, where he was cognizant of such fact at the time of the caucus, but made no objection.[4]

But, in Smith vs. Holt,[5] it was held that a candidate who was duly elected to office, at a legal election, was not estopped from accepting and holding such office, for the full term, on account of the fact that he had taken part in an election for this office improperly held the previous year.

Notes

1. Elliott vs. Burke, 113 Ky. 479, 68 S. W. 445; State vs. Barton, 58 Kan. 709, 51 Pac. Rep. 218.
2. 78 S. Car. 461.
3. State vs. Whitney, 12 Wash. 420, 41 Pac. Rep. 189.
4. Re Winton Nominations, 2 Lock Leg. N. (Pa.) 13.
5. 24 Kan. 773.

CHAPTER XI

CRIMES RELATING TO ELECTIONS

Section 59. Fraud in Registration

Wherever the registration of voters is required, fraudulent registration is always a crime on the part of the person wrongfully registering. Where a person knowingly registers at two election places, a criminal intent is not a necessary element of the crime.[1] A person is not put twice in jeopardy for the same offense by being tried for fraudulent registration, after having been acquitted of this offense, being tried for illegal voting at the election for which the registration was made.[2]

In some States there are statutory provisions for the punishment of all persons who cause, allow, or induce another to register fraudulently.[3]

The Revised Statute of the United States[4] provides for the punishment of any person who "does any unlawful act to secure registration for himself or for any other person."

A registration officer will always be criminally liable for knowingly permitting fraudu-

lent names to be placed, or to remain, on the registration lists;[5] but, except in Kansas and Maryland, it is held that registration officials are not criminally liable where they were deceived as to the qualifications of the person registered.

The crimes relative to registration are enumerated in the Illinois statutes as follows:

"If at any general registration of voters, or any meeting of the judges of election, held for such purpose, or for revision thereof, as provided in this act, any person shall falsely personate an elector or other person, and register, or attempt or offer to register, in the name of such elector or other person;

"Or if any person shall knowingly or fraudulently register or offer, or attempt, or make application to register, in, or under the name of, any other person, or in, or under any false, assumed or fictitious name, or in, or under any name not his own;

"Or shall knowingly or fraudulently register in two election precincts;

"Or, having registered in one precinct, shall fraudulently attempt or offer to register in another;

"Or shall fraudulently register or attempt, or offer to register in any election precinct, not having a lawful right to register therein;

"Or shall knowingly or wilfully do any unlawful act to secure registration for himself or any other person;

"Or shall knowingly, wilfully, or fraudulently, by false personation or otherwise, or by any unlawful means cause or procure, or attempt to cause or procure, the name of any qualified voter, in any election precinct, to be erased or stricken from any registry of the voters of such precinct, made in pursuance of this act or otherwise, as in this act provided;

"Or by force, threat, menace, intimidation, bribery, reward, or offer, or promise thereof, or other unlawful means prevent, hinder or delay any person having a lawful right to register or be registered, from duly exercising such right;

"Or shall knowingly, wilfully, or fraudulently compel or induce, or attempt, or offer to compel or induce, by such means, or any unlawful means, any judge of election or other officer of registration in any election precinct to register or admit to registration any person not lawfully entitled to registration in such precinct;

"Or to register any false, assumed or fictitious name, or any name of any person except as provided in this act;

"Or shall knowingly, or wilfully or fraudulently interfere with, hinder or delay any judge of election, or other officer of registration, in the discharge of his duties, or counsel, advise or induce, or attempt to induce, any such judge or other officer to refuse or neglect to comply with or to perform his duties, or to violate any law proscribed for regulating the same;

"Or shall aid, counsel, procure or advise any voter, person, judge of election, or other officer of registration, to do any act by law forbidden, or in this act constituted an offense, or to omit to do any act by law directed to be done;

"Every such person, upon conviction thereof, shall be adjudged guilty of a misdemeanor; and shall be punished by imprisonment in the county jail for not less than three months nor more than one year."

The laws of the other States on this subject, are very similar to the Illinois statute.

Notes

1. State vs. Caldwell, 2 Hardesty (Del.) 164.

2. In re Donahue, 4 Ohio, N. P. 246, 6 Ohio Dec. 389.

3. People vs. Sternberg, 111 Cal. 3;

United States vs. O'Connor, 31 Fed. Rep. 449.

4. Section 5512.

5. United States vs. Molloy, 31 Fed. Rep. 19.

Section 60. Illegal Voting

Illegal voting is always a crime in every jurisdiction. This crime may take various forms, such as voting by a person not qualified,[1] falsely impersonating a voter,[2] or voting more than once.[3]

The various acts which will constitute a crime of this character in Illinois (whose laws will serve as a fair example of the laws of the other States on this subject) are as follows:

"If, at any election hereafter held in any such city, village, or incorporated town, any person shall falsely personate any elector or other person, and vote, or attempt or offer to vote in, or under the name of such elector or other person;

"Or shall vote, or attempt to vote, in or upon the name of any other person, whether living or dead, or in or upon any false, assumed or fictitious name, or in or upon any name not his own;

"Or shall knowingly, wilfully or fraudu-

lently vote more than once for any candidate for the same office, except as authorized by law;

"Or shall vote, or attempt or offer to vote, in any election precinct without having a lawful right to vote therein;

"Or vote more than once, or vote in more than one election precinct;

"Or having once voted, shall vote or attempt or offer to vote again;

"Or shall knowingly, wilfully or fraudulently do any unlawful act to secure a right or an opportunity to vote for himself or for any other person;

"Or shall by force, threat, menace, intimidation, bribery, or reward, or offer or promise thereof, or otherwise unlawfully, either directly or indirectly, influence or attempt to influence any elector or any person in giving his vote;

"Or prevent or hinder, or attempt to prevent, or hinder any qualified voter from freely exercising the right of suffrage;

"Or by any such means induce or attempt to induce any such voter, or any person, to exercise any such right;

"Or shall, by any such means or otherwise, compel or induce, or attempt to compel or induce, any judge of election or other officer

of election, in any election precinct, to receive the vote of any person not legally qualified or entitled to vote at the said election in such precinct;

"Or shall knowingly, wilfully or fraudulently interfere with, delay or hinder, in any manner, any judge of election, poll clerk or other officer of election in the discharge of his duties;

"Or by any such means, or other unlawful means, knowingly, wilfully, or fraudulently counsel, advise, induce or attempt to induce, any judge of election, poll clerk or other officer of election whose duty it is to ascertain, proclaim, announce or declare the result of any such election, to give or to make any false certificate, document, report, return or other false evidence in relation thereto;

"Or to refuse or neglect to comply with his duty, or to violate any law regulating the same, or to receive the vote of any person in any election district not entitled to vote therein;

"Or to refuse to receive the vote of any person entitled to vote therein;

"Or to omit to do any act by law directed to be done;

"Every such person, upon conviction thereof, shall be adjudged guilty of a misde-

meanor, and shall be punished by imprisonment in the county jail for not less than three months nor more than one year.''[4]

Ignorance of law is no defense to a person who votes illegally;[5] but a mistake as to facts, such as to the voter's own age, may be a good defense.[6]

In the absence of fraud or collusion the decision of the election officials that a certain person has the right to vote, will relieve him of criminal liability.[7]

Notes

1. State vs. Ninnick, 15 Iowa, 124.
2. State vs. Perkins, 42 Vt. 399.
3. State vs. McClarnon, 15 R. I. 462: Fleet vs. State, 74 Md. 552.
4. Illinois Statutes, Act of July 8, 1899.
5. People vs. Barber, 48 Hun. (N. Y.) 198.
6. Gordon vs. State, 52 Ala. 308.
7. State vs. Pearson, 97 N. C. 434; but contra Morris vs. State, 7 Blackf. (Ind.) 606.

Section 61. Bribery

The scope of the crime of bribery in elections, is very broad. The crime is committed wherever money, or any other valuable consideration is given or offered, to induce a voter to vote for a certain party or candidate, or to refrain from voting at all; or when a

voter receives, or asks for, money, or other valuable consideration as a consideration for voting in a certain way or for not voting at all.

"It has been held indictable at common law to be concerned either as actor or receiver in bribery or attempt at bribery by giving rewards or making promises in order to procure votes in elections;[1] by giving refreshments to voters before they vote to induce them to vote for a particular candidate;[2] by promising money to a member of a corporation to induce him to vote for mayor;[3] by one elector agreeing to vote for the favorite candidate of another elector for clerk in consideration that the latter shall vote for the favorable candidate of the former for commissioner;[4] by giving money to a voter and taking his note, at the same time giving a counter-note to deliver up the first note, when the elector has voted as required;[5] by betting with a voter that he will not vote for a particular person for the purpose of inducing him to vote for such person;[6] and by several persons mutually agreeing to procure for another an appointment to a public office for a sum of money to be divided among them,[7] and by giving a voter money to go out of town and forbear voting.[8] The statute pro-

vides for the punishment of all these cases as common-law offenses. If a voter received from one person a card or token in one room which he presents to another person in another room, and thereupon received the money, it is evidence of the payment of money by the former.'' [9] [10]

In general, the same acts will constitute bribery at a primary election as at a regular election; but the Illinois Primary Election Act contains the provision that the person giving the bribe shall not be guilty of any crime. The text of this section of the statute is as follows:

''Any person who shall solicit, request, demand or receive, directly or indirectly, any money, intoxicating liquor or other thing of value, or the promise thereof, either to influence his vote, or to used, or under the pretense of being used to procure the vote of any other person or persons, or to be used at any poll or other place prior to, or on the day of a primary for or against any candidate for office, or for or against any measure or question to be voted upon at such primary, shall be deemed guilty of the infamous crime of bribery in primaries and upon conviction thereof in any court of record, shall be sentenced to disfranchise-

ment by the judge of such court for a term of not less than five and not more than fifteen years, and to the county jail not less than three months and not more than one year, and to pay the cost of prosecution and stand committed to the county jail until such costs are fully paid. That for a conviction of a second offense under this section, the first being alleged and proven, such offender shall be by sentence of the court forever thereafter disfranchised and deprived of the right to vote at a primary in this State, and be imprisoned in the county jail not less than one year, and be committed to jail in default of the payment of costs of prosecution until such costs are fully paid. Prosecutions may be had under this section by indictment in the Circuit Court, or by information in the county courts, and the effect of a sentence of disfranchisement in either of said courts, both having jurisdiction of offenses hereunder, shall be to deprive such persons sentenced to (of) the right to vote at any primary within this State for a period of time fixed by the court where such person shall be convicted under this section. Any candidate or other person paying, furnishing or promising to pay or furnish or bribing such person with money, intoxicating liquor,

or any other thing of value, or the promise thereof, shall not be liable to punishment therefor, but shall be a competent witness and compelled to testify in prosecution under this section. Solicitations of any person of a loan of money, or the purchase of anything of value, or any other subterfuge, shall be deemed a violation thereof."

Notes

1. Rex. vs. Pitt, 3 Burr, 1335; Vaughan's Case, 4 Burr, 2494; U. S. vs. Norrel, Whart, St. Tr., 189; Com. vs. Shaver, 3 Serg. & W., 338; Rex vs. Cupland, 11 Md., 387; Com. vs. Shaver, Watts & S., 338.
2. Hughes vs. Marshall, 2 Tyrw., 134; 5 Car. & P., 151.
3. Rex. vs Plympton, 2 Campb., 229; 2 Ld. Raym., 1377; Walsh vs. People, 65 Ills., 58.
4. Com. vs. Callaghan, 2 Va. Cas., 460.
5. Sulston vs. Norton, 3 Burr, 1235.
6. Roscoe Ev., 327.
7. Rex. vs. Pollman, 2 Camp., 229.
8. R. S., 395, §292.
9. Webb vs. Smith, 4 Bing., 373.
10. Moore's Criminal Law, §656.

Section 62. Offenses by Election Officers

Election officials are not generally held criminally liable for any acts caused by errors

of judgment without wilful disregard of duty[1] or fraudulent intent.[2]

Such officials, however, are held strictly to account criminally for any fraud or intentional misconduct on their part.

Election officials are criminally liable for altering ballots,[3] making false returns of the votes cast,[4] obstructing other election officers,[5] wilfully receiving votes from persons not entitled to vote,[6] or wilfully refusing to allow qualified voters to vote.[7]

Notes

1. United States vs. Dwyer, 56 Fed. Rep. 464. Am. and Eng. Encyc. of Law. Vol. X, p. 851.
2. People vs Burns, 75 Cal. 627.
3. Commonwealth vs. McGurty, 145 Mass. 257.
4. People vs. Sullivan, 7 N. Y. Crim. Rep. 420; Commonwealth vs. Mayor, Thatch, Crim. Cas. 298.
5. In re Depriest, 43 Fed. Rep. 911.
6. State vs. McDonald, 4 Harr, (Del.) 555; State vs. Krueger, 134 Mo. 262.
7. State vs. Daniels, 44 N. H. 383.

Section 63. Minor Offenses Relating to Elections

Among the other crimes relating to elections, which are provided against by the stat-

utes in more or less of the various States, are: Betting on elections,[1] intimidating voters, carrying weapons in the vicinity of any polling place,[2] and selling or giving away liquor during the time the polls are open,[3] or during the whole of election day.[4]

Notes

1. Wagner vs. State, 63 Ind. 250.
2. Cooper vs. State, 26 Tex. App. 575.
3. Wolf vs. State, 59 Ark. 297.
4. Commonwealth vs. Murphy, 95 Ky. 38.

Section 64. At What Election Offense May Be Committed

In order to convict a person for any crime relating to elections, the election in connection with which the alleged crime was committed must have been a legal election.[1] No act committed with relation to an election not authorized by law, not properly called, or otherwise invalid, can constitute a crime.[2]

Notes

1. Reed vs. Lamb, 6 H. and N. 75.
2. United States vs. Badnielli, 37 Fed. Rep. 138.

Section 65. Federal Statutes as to Crimes Relating to Elections

The provisions of the Federal statutes as

to crimes relating to elections are as follows:

Sec. 5507. (Intimidating voters by bribery or threats.) Every person who prevents, hinders, controls, or intimidates another from exercising, or in exercising the right of suffrage to whom that right is guaranteed by the fifteenth amendment to the Constitution of the United States, by means of bribery or threats of depriving such person of employment or occupation, or of ejecting such person from a rented house, lands, or other property, or by threats of refusing to renew leases or contracts for labor, or by threats of violence to himself or family, shall be punished as provided in the preceding section.[1]

Sec. 5509. (Other crimes committed while violating the preceding sections.) If in the act of violating any provision in either of the two preceding sections any other felony or misdemeanor be committed, the offender shall be punished for the same with such punishment as is attached to such felony or misdemeanor by the laws of the State in which the offense is committed.

Sec. 5528. (Unlawful presence of troops at elections.) Every officer of the Army or Navy, or other person in the civil, military, or naval service of the United States, who

orders, brings, keeps, or has under his authority or control, any troops or armed men at any place where a general or special election is held in any State, unless such force be necessary to repel armed enemies of the United States or to keep the peace at the polls, shall be fined not more than five thousand dollars and suffer imprisonment at hard labor not less than three months nor more than five years.

Sec. 5529. (Intimidation of voters by officers, etc., of Army or Navy.) Every officer or other person in the military or naval service who, by force, threat, intimidation, order, advice, or otherwise, prevents, or attempts to prevent any qualified voter of any State from freely exercising the right of suffrage at any general or special election in such State, shall be fined not more than five thousand dollars, and imprisonment at hard labor not more than five years.

Sec. 5530. (Officers of Army or Navy prescribing qualifications of voters.) Every officer of the Army or Navy who prescribes or fixes or attempts to prescribe or fix, whether by proclamation, order, or otherwise, the qualifications of voters at any election in any State, shall be punished as provided in the preceding section.

Sec. 5531. (Officers, etc., of Army and Navy interfering with officer of election, etc.) Every officer or other person in the military or naval service who by force, threat, intimidation, order, or otherwise, compels, or attempts to compel, any officer holding an election in any State to receive a vote from a person not legally qualified to vote, or who imposes, or attempts to impose any regulations for conducting any general or special election in a State different from those prescribed by law, or who interferes in any manner with any officer of an election in the discharge of his duty, shall be punished as provided in section fifty-five hundred and twenty-nine.

Sec. 5532. (Disqualification for holding office.) Every person convicted of any of the offenses specified in the five preceding sections shall, in addition to the punishments therein severally prescribed, be disqualified from holding any office of honor, profit, or trust under the United States; but nothing in those sections shall be construed to prevent any officer, soldier, sailor, or marine from exercising the right of suffrage in any election district to which he may belong, if otherwise qualified according to the laws of the State in which he offers to vote.

Notes

(1) "The preceding section" above referred to, is repealed.
notes, infra, p. 870.

This section is in excess of the power of Congress and is void. The essential element of discrimination on account of race, etc., is wanting, and the section is therefore unauthorized by the Fifteenth Amendment to the Constitution. U. S. v. Amsden, (1881) 6 Fed. Rep. 819; Lackey v. U. S., (C. C. A. 1901) 107 Fed. Rep. 114.

CHAPTER XII

FEDERAL ELECTIONS

Section 66. Election of Federal Officers

The only Federal officers elected directly by the people are the Representatives in Congress. The President, Vice-President, and Senators are elected by the people indirectly, the former through the medium of presidential electors, the latter through the State Legislatures. The proposed Sixteenth Amendment to the Constitution, if adopted, will add the United States Senators to the list of Federal officers elected by the people.

The Presidential electors are apportioned among the several States, each State having as many Presidential electors as it has Senators and Representatives in Congress combined. Each State has the authority to appoint its electors "in such a manner as the Legislature thereof may direct," and the electors from each State meet and vote by themselves.

The United States Senate is distinctively the representative body of the States, each

State having two members who are chosen by the State Legislatures.

In the lower house the members are apportioned among the States according to their respective populations, and it is left to the States to arrange the congressional districts. The Constitution provides that members of this house must be elected by the people in each State, but the qualifications necessary to voting for representatives is left to each State to determine by the constitutional provision that the electors in each State shall have the qualifications requisite for the electors of the most numerous branch of the State Legislature.

"The times, places and manner of holding elections for Senators and Representatives shall be prescribed in each State by the Legislature thereof; but the Congress may, at any time, by law make or alter such regulations, except as to the places of choosing Senators."

The power granted by this section of the United States Constitution has been very little used by Congress, except during the period following the Civil War. Congress, however, possesses this power of control over these elections in the fullest extent, and can either provide for complete Federal

control of such election or pass laws and regulations binding on the election officers appointed by the State.

The leading case on the question of the right of Congress to pass laws regulating congressional elections is that of Ex parte Siebold. In this case Siebold and others, who were judges of election in the city of Baltimore, appointed to such positions under the laws of Maryland, were convicted for the violation of sections 5515 and 5522 of the Revised Statutes of the United States, which statutes established certain regulations governing elections at which Congressmen were elected and imposing certain duties upon all election officers serving at such elections. In the decision in this case it was held that in exercising its constitutional right to regulate congressional elections it is not necessary that Congress should assume entire control of such elections, but may exercise this power of regulation by acting in conjunction with the States, and that in such cases the Federal statutes relative to such elections will prevail over the State statutes.

Under this power to regulate elections Congress may make any regulation necessary to secure to all electors in every State

the full and fair opportunity to declare their will.

The Federal statutes at present contain the following provisions as to the regulation of elections:

Sec. 2003. (Interference with freedom of election by officers of Army or Navy.) No officer of the Army or Navy of the United States shall prescribe or fix, or attempt to prescribe or fix, by proclamation, order, or otherwise, the qualifications of voters in any State, or in any manner interfere with the freedom of any election in any State, or with the exercise of the free right of suffrage in any State.

Sec. 2004. (Race, color, or previous condition not to affect the right to vote.) All citizens of the United States who are otherwise qualified by law to vote at any election by the people in any State, Territory, district, county, city, parish, township, school district, municipality, or other territorial subdivision, shall be entitled and allowed to vote at all such elections, without distinction of race, color, or previous condition of servitude; any constitution, law, custom, usage, or regulation of any State or Territory, or by or under its authority, to the contrary notwithstanding.

Section 67. Contested Congressional Elections

As has been already shown the Constitution makes each house the judge of the elections, returns and qualifications of its members.[1] Either house has the right to decide all questions both of law and of fact necessary to determine the right of any individual who may claim to be one of its members.[2]

The second clause of the third section of the First Article closes with an ambiguous provision which has since been the occasion of a great deal of controversy: "And if vacancies happen, by resignation, or otherwise, during the recess of the Legislature of any State, the executive thereof may make temporary appointments until the next meeting of the Legislature, which shall then fill such vacancy." Under this clause the question has arisen several times whether, when the Legislature is in session when the vacancy occurs, and then adjourns without electing a senator, the governor may fill the vacancy.

The intention of the Constitutional Convention on this point can be readily seen by examination of the first draft of the Constitution as reported to the convention by the committee on detail on August 6th. In this

draft, Article V, Section 4, read as follows: "The Senate of the United States shall be chosen by the Legislatures of the several States. Each Legislature shall choose two members. Vacancies may be supplied by the executive until the next meeting of the Legislature. Each member shall have one vote."[3] Here is an unequivocal grant to the executives of the several States of the right to fill vacancies in the senate, no matter when occurring. This grant of power was never thereafter changed by the vote of the Convention, and never intentionally changed at all. The ambiguity arose from the language adopted by the committee on style in their final draft of the Constitution. This was a finishing committee appointed by the convention to correct the style and form of the Constitution without any power to alter its substance. It is thus clear from the study of the history of the Constitutional Convention that the executive authority of the State should have the power to fill a vacancy in the Senate, even when the same arises from the failure of the Legislature to elect; the Senate, however, upon every occasion when the question has come before them, has refused to seat the member thus appointed.[4] It must, therefore,

be taken as the settled law that the governor of a State cannot fill a vacancy in the Senate which existed while the Legislature was in session.

The statutes of the United States[5] provide that the Legislature chosen next preceding the expiration of the term of office of any senator shall elect a senator on the second Tuesday after its first meeting and organization. In case of a vacancy the election shall be held on the second Tuesday after the Legislature shall be organized and have notice thereof.[6] In either case at least one ballot a day must be taken until the end of the session, by the Legislature, unless the senator be sooner chosen.[7] A senator can never be elected by a minority vote, even if the person receiving the majority vote is ineligible.[8] Where each of the two rival Legislatures, one more nearly approaching a de facto Legislature and the other more nearly a de jure Legislature, but neither of which has a majority of legally elected members, elect senators, neither of such senators can claim a legal election and both will be denied a seat.[9] [10]

Notes

1. United States Constitution, Art. I, Sec. 5, Clause 1.

2. Baker 1 Bart. El. Cases, 92.
3. Madison's Journal of the Federal Convention, under date of August 6th.
4. Johns. Taft El. Cases, 1.
5. Rev. Stat. U. S. Sec. 14.
6. Rev. Stat. U. S. Sec. 17.
7. Rev. Stat. U. S. Sec. 15.
8. Rawson vs. Abbott, Taft El. Cases, 338.
9. The Louisiana Cases, Taft El. Cases 426.
10. Putney's "United States Constitutional History and Law." Section 125.

Section 68. Presidential Elections

The manner in which the President of the United States should be chosen was one of the much discussed questions before the Federal Constitutional Convention.

Among the various methods proposed were elections by the people, by the executives of the different States, the executive of each State having one vote; by the executives of the different States, the executive of each having a vote proportionate to the population of the State; by Congress; by the Senate; and by Presidential electors. This last method, which was finally adopted, was suggested by the method used to elect State senators in Maryland. The provision contained in the Constitution as finally adopted is as follows:

"The executive power shall be vested in a President of the United States of America. He shall hold office during the term of four years, and, together with the Vice-President, chosen for the same term, be elected as follows:

"Each State shall appoint, in such manner as the Legislature thereof shall direct, a number of electors equal to the whole number of senators and representatives to which the State may be entitled in the Congress; but no senator or representative, or person holding an office of trust or profit under the United States, shall be appointed as elector.

"The electors shall meet in their respective States and vote by ballot for two persons, of whom one at least shall not be an inhabitant of the same State with themselves. And they shall make a list of all persons voted for, and of the number of votes for each, which list they shall sign and certify and transmit sealed to the seat of Government of the United States, directed to the President of the Senate. The president of the Senate shall, in the presence of the Senate and the House of Representatives, open all the certificates, and the votes shall then be counted. The person having the greatest number of votes shall be President, if such number be

the majority of the whole number of electors appointed, and if there be more than one who have such majority, and have an equal number of votes, then the House of Representatives shall immediately choose by ballot one of them for President; and if no person have a majority, then from the five highest on the list the said House shall in like manner choose the President. But, in choosing the President the votes shall be taken by States, the representatives from each State having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the States, and a majority of all the States shall be necessary to a choice. In every case after the choice of President the person having the greatest number of votes of the directors shall be the Vice-President. But if there should remain two or more who have equal votes, the Senate shall choose from them by ballot the Vice-President.

"The Congress may determine the time of choosing the electors and the day on which they shall give their votes, which day shall be the same throughout the United States." [1]

No other clause in the Constitution has worked in a manner so foreign to the expectation of the framers of the Constitution as

has this one. The intention of the framers of the Constitution was to have the President elected only indirectly by the people; the people were to elect the Presidential electors, men of character and standing in the community, who were then on their own judgment to elect the President. As a matter of fact, the people from the start took upon themselves the power of choosing their President. By the third election, that of 1796, regular party candidates were in the field and the Presidential electors were reduced to mere figureheads. Since this time these electors have merely registered the dictates of the National Convention of the political party by which they were nominated. This unbroken custom, by which electors are obliged to vote for the candidates of their party, is the nearest approach in our institutions to anything corresponding to the so-called conventions of the English Constitution.

One serious defect in the method of electing the President and Vice-President early made itself manifest. As each elector voted for two men for the office of President and as each party had two candidates (one of whom they intended for Vice-President) it was soon seen that the natural result of the electors voting their straight party ticket

would be a tie vote for the position of President. To avoid such a result in 1796, a number of the Federalist electors (that party having secured a majority of the Electoral College) withheld their votes from Pinckney, one of the candidates of this party, in order to make John Adams President and Pinckney Vice-President. A miscalculation, however, resulted in Pinckney receiving fewer votes than Thomas Jefferson, one of the candidates of the Democratic party. The result was the election of John Adams, a Federalist, as President, and of Thomas Jefferson, a Democrat, as Vice-President.

In the election of 1800, the Democrats elected seventy-three presidential electors and the Federalists sixty-five. To prevent a result similar to that in 1796, all of the Democratic electors voted for both Thomas Jefferson and Aaron Burr for President.

This resulted in the long contest in the House of Representatives between Jefferson and Burr. To remedy the defect, shown by the results in 1796 and 1800, the Twelfth Amendment was submitted to the States in 1803 and adopted in 1804. By this amendment provision was made for separate balloting for President and Vice-President. The Twelfth Amendment is as follows:

"The electors shall meet in their respective States and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same State with themselves; they shall name in their ballots the person voted for President and in distinct ballots the person voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify and transmit sealed to the seat of Government of the United States, directed to the President of the Senate; the President of the Senate shall, in the presence of the Senate and House of Representatives, open all certificates, and the votes shall then be counted; the person having the greatest number of votes for President shall be President, if such number be a majority of the whole number of electors appointed; and if no person have such a majority, then from the persons having the highest numbers, not exceeding three, on the list of those voted for as President, the House of Representatives shall choose immediately by ballot the President. But in choosing the President the votes shall be taken by States, the representation of each State having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the

States, and a majority of all the States shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them before the 4th day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President.

"The person having the greatest number of votes as Vice-President shall be the Vice-President, if such number be a majority of the whole number of electors appointed, and if no person have a majority, then from the two highest numbers on the list the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of senators, and a majority of the whole number shall be necessary to a choice.

"But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States."

Presidential electors have, in the past, been chosen in many different ways, three methods in particular having been common in the early days of the Republic, viz., by State Legislatures; by the people voting by districts; and by the people by general vote of

the State.[2] Since 1832 they have been uniformly chosen in the last named manner except that in South Carolina they were chosen by the Legislature until after the Civil War, and in Michigan they were chosen by districts in the election of 1892.[3] The manner of choosing these electors is entirely in the hands of the different States and is not subject to the revision or control of the general Government.[4] Presidential electors are State officials and not Federal officials. Congress, however, may determine the time of choosing the electors, and the day on which they shall give their votes, which day shall be the same throughout the United States.[5]

There is an uncertainty in the Constitution as to the procedure at the counting of the votes for President and as to the method to be used in determining the legality of any undisputed votes. It has been argued by different factions at different times that the decision rested with the Vice-President, with the two houses of Congress voting together, and with the two houses of Congress voting separately. The latter would seem to be the correct view, but it fails to provide for cases where a deadlock might arise between the two houses on the question of accepting or rejecting certain votes. This question, which

brought the country almost to the verge of Civil War on the disputed election of 1876, has never been passed upon by the United States courts. The dispute in 1877 was settled by the creation of the Electoral Commission, a temporary and unsatisfactory expedient which cannot become a precedent.

The method of electing the President in case no candidate receives the votes of a majority of the electors is a very anomalous one, and one which might lead to very unexpected results if this country should ever have three or more strong political parties, instead of two such parties.

In case no candidate for President has a majority the election goes to the House of Representatives, where two peculiar conditions are to be noted: first, the election is not by the House of Representatives elected at the same time as the Presidential electors, but by the House of Representatives chosen two years previous; the election would therefore under any circumstances be determined not by the political sentiments of the people at the time of the election, but by the sentiment which existed two years before. Second, the election is not by general vote of the House, but by States, each State having one vote and a majority of all the States

being required to elect, the vote of each State being determined by the vote of the majority of the members from the State. In case a representation from any State in the House of Representatives was equally divided politically, the vote of the State would be lost. The vote of the majority of all the States, however, would be necessary to elect a President, and if there were three or more candidates, each with material strength, or the vote of the several States was equally divided, and thus lost, an election of a President by the House would become very improbable. For example, in the year of this writing (1912), although one of the two great political parties has a substantial majority in the House of Representatives, one of the two leading parties have a majority in the representation of twenty-two States, the other in the representation of twenty-three States, and the vote of three States is equally divided between them.

The election of the Vice-President where no candidate has a majority goes to the Senate, who must choose from the two candidates receiving the highest number of votes. At first sight it would seem certain that a Vice-President would be chosen, except in the unlikely contingency of the Senate being

equally divided between the two candidates. In case the Vice-President was thus chosen, and no chose of President was made, the person chosen as Vice-President would, in virtue of his election to this office, automatically become President on the fourth of March. There is one provision in the Constitution, however, which would make it very easy to prevent the election of any person as Vice-President; the Constitution requiring two-thirds of the members of the Senate to make a quorum when the Vice-President is to be chosen. Any number of senators constituting more than one-third of the body could prevent the election by absenting themselves from the Senate.

In case no person was chosen either as President by the House of Representatives, or as Vice-President by the Senate, upon the fourth of March, the office of President would devolve upon the Secretary of State in the Cabinet of the retiring President, or if he was ineligible, upon the highest member of the Cabinet (according to the Presidential Succession Law) eligible for the office.

Notes

1. United States Constitution, Art. II, Sec. 1.

2. McPherson vs. Blacker, 146 U. S. 25.

3. The States which chose Presidential electors otherwise than by general ticket, prior to 1832, and the elections in which they were thus chosen, were as follows:

Rhode Island by the legislature from 1792 to 1796; Massachusetts by districts from 1789 to 1796, and in 1812, 1820 and 1824, and by the legislature from 1800 to 1808, and in 1816.

Connecticut by the legislature from 1789 to 1820.

New Hampshire by the legislature in 1800.

New York by the legislature from 1792 to 1824, and by districts in 1828.

New Jersey by the legislature from 1789 to 1804 and in 1812.

Pennsylvania by the legislature in 1800 and by districts in 1816.

Delaware by the legislature from 1789 to 1828.

Virginia by districts from 1789 to 1796 and from 1812 to 1816.

South Carolina by the legislature throughout this entire period.

North Carolina by districts from 1792 to 1808 and by legislature in 1812.

Maryland by districts from 1796 to 1832.

Georgia by legislature from 1789 to 1800 and from 1816 to 1834.

Vermont by legislature from 1792 to 1800 and in 1816 and by district in 1804.

Kentucky by legislature from 1792 to 1796, and by districts in 1804 to 1824.

Tennessee by legislature from 1796 to 1804, and by districts from 1804 to 1828.

Louisiana by the legislature in 1824.

Illinois by districts in 1824.

Maine by districts from 1824 to 1828.

4. Id. United States Constitution, Art. II, Sec. 1, Clause 4.

5. McPherson vs. Blacker, 146 U. S. 25.

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